Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

CEMEX, S.A.,

Petitioner,

v.

UNITED STATES OF AMERICA,
AD HOC COMMITTEE OF AZ-NM-TX-FL
PRODUCERS OF GRAY PORTLAND CEMENT,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

By failing to object to a then controlling judicial decision, does a party waive application of a subsequent reversal of that decision?

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, Petitioner, CEMEX, S.A., states that it has no parent corporation. CEMEX does have a number of subsidiaries worldwide. These subsidiaries (except wholly-owned subsidiaries) are set forth in Appendix K.

The respondents in this case are the United States Department of Commerce, Defendant-Appellee below, and The Ad Hoc Committee of AZ-NM-TX-FL Producers of Gray Portland Cement, Plaintiff-Appellee below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, CEMEX, S.A., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit entered in this case.

OPINIONS BELOW

The judgment of the U.S. Court of Appeals for the Federal Circuit in *Ad Hoc Committee of AZ-NM-TX-FL Producers of Gray Portland Cement v. United States*, Appeal No. 95-1485 (Fed. Cir. 1996), is reprinted at Appendix A. The Order of the Court of Appeals denying Petitioner's petition for rehearing is reprinted at Appendix B. The decisions below of the U.S. Court of International Trade, Slip Op. 95-125 (Ct. Int'l Trade July 12, 1995), Slip Op. 95-91 (Ct. Int'l Trade May 15, 1995), and 865

F.Supp. 857 (Ct. Int'l Trade 1994), are reprinted at Appendices C, D and E. The Commerce Department Final Determination published in the *Federal Register at* 58 Fed. Reg. 6113 (1993) is reprinted at Appendix F.

JURISDICTION

The judgment of the Court of Appeals was entered on August 1, 1996. The Court of Appeals denied Petitioner's petition for rehearing on October 7, 1996. This Court has jurisdiction to review the judgment of the Court of Appeals under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AT ISSUE

The following statutory provisions are relevant to this case and are set out in Appendix J: 19 U.S.C. § 1675 (agency reviews under Antidumping Duty Orders), and 19 § U.S.C. 1516a (judicial review of final agency determinations).

STATEMENT OF THE CASE

The facts of this case arise under the U.S. antidumping statute.[1] This statute provides that the Department of Commerce ("Commerce") is to conduct an annual review of the amount of antidumping duties due on imports of a product covered by an Antidumping Duty Order.[2] The statute also requires that, within directed time frames, Commerce publish its Final Determination of its results of the review in the *Federal Register*. An interested party then has 30 days from the date of *Federal Register* publication to seek judicial review of this Final Determination.[3] This judicial review is conducted by the U.S. Court

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[1] Trade Agreements Act of 1979, Pub. Law 96-38, 93 Stat. 162 *et seq.* (1979), *as amended, codified at* 19 U.S.C. § 1673 *et seq.*

[2] 19 U.S.C. § 1675(a)(1).

[3] 19 U.S.C. § 1516a(a)(1).

of International Trade ("CIT")[4] and the United States Court of Appeals for the Federal Circuit ("CAFC").[5] The relevant standard of judicial review is that Commerce's Final Determination must be affirmed unless it is found to be "contrary to law."[6]

On April 28, 1993, Commerce published its Final Determination in an annual review of imports covered by Antidumping Duty Order for cement from Mexico.[7] An important part of the calculations in Commerce's Final Determination involved the method of adjusting for Mexico's Value-Added Tax ("VAT"). In its Final Determination, Commerce made this adjustment using what has become known as the *Federal-Mogul* methodology.

Another interested party appealed Commerce's Final Determination to the CIT arguing that Commerce's use of the *Federal-Mogul* methodology was not in accordance with law. While this appeal was pending before the CIT, the CIT examined the issue of antidumping adjustments for VAT in the context of an appeal from a Commerce Department Final Determination under a different Antidumping Duty Order, involving anti-friction bearings from Japan. In the *Anti-Friction Bearing* case, the CIT held that Commerce's use of the *Federal-Mogul* methodology was not in accordance with law,[8] but that an alternative methodology, which has become known as the *Torrington* methodology, was in accordance with law.[9]

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[4] 28 U.S.C. § 1581(c).

[5] 28 U.S.C. § 1295(a)(5).

[6] 19 U.S.C. § 1516a(b).

[7] 58 Fed. Reg. 6113 (1993), Appendix F.

[8] *Federal-Mogul Corp. v. United States*, 834 F. Supp. 1391 (Ct. Int'l Trade 1993) (*"Federal-Mogul I"*).

[9] *Torrington Co. v. United States*, 832 F. Supp. 379 (Ct. Int'l Trade 1993), *aff'd* 853 F. Supp. 446 (Ct. Int'l Trade 1994), *aff'd* 866 F. Supp. 581 (Ct. Int'l Trade 1994) (*"Torrington"*).

In the wake of its VAT decisions in the *Japanese Anti-Friction Bearings* case, the CIT subsequently held that Commerce's use of the *Federal-Mogul* VAT methodology in its Final Determination in the *Mexican Cement* case was not in accordance with law. It remanded the case to Commerce and ordered Commerce to use instead the *Torrington* methodology.[10] CEMEX did not initially object to the CIT's order that the *Torrington* methodology be used, but subsequently argued to Commerce and to the CIT that modifications were necessary to the *Torrington* methodolgy. The CIT held that this argument was untimely and affirmed Commerce's remand results in which, as ordered, Commerce had substituted the *Torrington* methodology for *Federal-Mogul* methodology.[11]

CEMEX appealed to the CAFC. Shortly after CEMEX commenced its appeal, the CAFC overturned the CIT's decision in *Federal-Mogul I* and held that the *Federal-Mogul* methodology was in accordance with law.[12] Commerce immediately returned to use of the *Federal-Mogul* methodology in all subsequent cases,[13] including the

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[10] *Ad Hoc Committee of AZ-NM-TX-FL Producers of Gray Portland Cement v. United States*, 865 F. Supp. 857 (Ct. Int'l Trade 1994), Appendix E at 38a.

[11] *Ad Hoc Committee of AZ-NM-TX-FL Producers of Gray Portland Cement v. United States*, 19 CIT ——, Slip Op. 95-91 (May 5, 1995), Appendix D; *Ad Hoc Committee of AZ-NM-TX-FL Producers of Gray Portland Cement v. United States*, 19 CIT ——, Slip Op. 95-125 (July 12, 1995), Appendix C.

[12] *Federal-Mogul Corp. v. United States*, 63 F.3d 1572 (Fed. Cir. 1995) ("*Federal-Mogul II*").

[13] *See, e.g., Tapered Roller Bearings from Japan and Parts Thereof from Japan*, 61 Fed. Reg. 57,629, 57,646 (1996); *POS Cookware from Mexico*, 61 Fed. Reg. 54,616, 54,617 (1996); *Certain Cold Rolled Steel Flat Products From the Netherlands*, 61 Fed. Reg. 48,465; *Granular PTFE Resin from Italy*, 61 Fed. Reg. 25,195, 25,196 (1996); *DRAM's from Korea*, 61 Fed. Reg. 20,216 (1996); *Certain Corrosion Resistant Carbon Steel Flat Products from Korea*, 61 Fed. Reg. 18,547, 18,548 (1996); *Certain Cut To Length*

Japanese Anti-friction Bearings case,[14] but one.

The one exception in this case. In its brief to the CAFC regarding this issue, Commerce said that (i) it believed that CEMEX waived "any" objection to Commerce's application of the *Torrington* methodology, but that (ii), if the courts found otherwise, Commerce would apply the *Federal-Mogul* methodology used in its Final Determination.[15]

In its decision, *Ad Hoc Committee of AZ-NM-TX-FL Producers of Gray Portland Cement*, CAFC Appeal No. 95-1485 (Fed. Cir. 1996), the CAFC began by noting that it applies anew the statutory standard of review set forth in 19 U.S.C. § 1516a(b). *Ad Hoc Comm.* No. 95-91, Slip Op. at 3; Appendix A at 3a. It then found that CEMEX had an obligation to raise "any objection it may have had" to use of the of *Torrington* when the CIT deemed proper, and that, by failing to timely object,

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Carbon Steel Plate from Sweden, 61 Fed. Reg. 15,772, 15,775 (1996); *Certain Corrosion Resistant Carbon Steel Flat Products from Canada*, 61 Fed. Reg. 13,825 (1996); *Elemental Sulfur from Canada*, 61 Fed. Reg. 45,9937 (1996); *Carbon Steel Plate from Germany*, 61 Fed. Reg. 13,845 (1996); *Color Television Receivers from Korea*, 61 Fed. Reg. 4,408, 4,412 (1996); *Brass Sheet and Strip from Canada*, 61 Fed. Reg. 1,560 (1996); *Brass Sheet and Strip from the Netherlands*, 61 Fed. Reg. 1324, 1326 (1996); *Certain Cold Rolled Carbon Steel Flat Products from Germany*, 60 Fed. Reg. 65,264, 65,273 (1995); *Certain Cold Rolled Flat Products from Korea*, 60 Fed. Reg. 63,499, 63,504 (1995); *Porcelain-on-Steel Cookware from Mexico*, 60 Fed. Reg. 58,044 (1995).

[14] Based on a request from Commerce to be allowed to return to use of the *Federal-Mogul* methodology, the CIT vacated its earlier decision affirming use of the *Torrington* methodology. *Torrington Co. v. United States*, Slip. Op. 96-9 (Ct. Int'l Trade, January 4, 1996).

[15] Brief for Government at 7, n.2, *Ad Hoc Committee of AZ-NM-TX-FL Producers of Gray Portland Cement v. United States*, Appeal No. 95-1485, reprinted as Appendix I at 92a.

CEMEX "waived its right" to seek a return to the *Federal-Mogul* methodology used in Commerce's Final Determination. *Id.* at 5-6; Appendix A at 4a.

REASONS FOR GRANTING THE WRIT

At bottom, the CAFC's decision stands for the proposition that a party, by failing to object to a then controlling judicial decision, waives the application of a subsequent reversal of that decision. This proposition is contrary to the decisions of other Circuit Courts and to the teachings of this Court. If left to stand, this decision will deny to CEMEX, and could deny to other parties, the benefit of subsequent controlling precedent. This Court should thus resolve this important federal question by reversing the CAFC's decision.

I. COMMERCE'S USE OF THE *FEDERAL-MOGUL* METHODOLOGY IN ITS APRIL 28, 1993 FINAL DETERMINATION MUST BE AFFIRMED UNLESS IT IS CONTRARY TO LAW.

The first issue here is the subject of and standard for judicial review. The answer to this issue is clearly found in the statute. The subject of judicial review is Commerce's Final Determination of April 28, 1993 and specifically Commerce's decision contained in it to use the *Federal-Mogul* methodolgy. 19 U.S.C. § 1516a(a) provides that only Final Determinations of annual reviews are subject to judicial review. 19 U.S.C. § 1675(a) provides that a Final Determination must: (i) contain Commerce's results of its completed annual review; (ii) be issued pursuant to statutorily directed time frames; and (iii) be published in the Federal Register. Commerce's April 28, 1993 Final Determination met these requirements. Specifically, it: (i) contained the results of Commerce's completed annual review under the *Mexican Cement* Antidumping Duty Order, and specifically its decision to use the *Federal-Mogul* VAT methodology; (ii) was issued pursuant to the statutorily directed time frames; and (iii) was published in the Federal Register.

Conversely, Commerce's inclusion of the *Torrington* methodology in its June 1995 court-ordered remand results is not the correct subject of judicial review.[16] The inclusion of the *Torrington* methodology in the June 1995 court-ordered remand results was not a determination made within the statutorily directed time frame—that determination (the April 28, 1993 Final Determination using the *Federal-Mogul* methodology) was made more than two years earlier. The June 1995 remand results using the *Torrington* methodology were never published in the *Federal Register*. Finally, and most importantly, the use of the *Torrington* methodology in the June 1995 remand did not represent *Commerce's* final results of its annual review. *Commerce's* results are set forth in its April 28, 1993 Final Determination where it uses the *Federal-Mogul* methodology. Commerce has specifically confirmed that, if the "waiver" bar is lifted, it will use the *Federal-Mogul* methodology used in its April 28, 1993 Final Determination.[17] Thus, rather than reflecting Commerce's own determination, the use of the *Torrington* methodology in the June 1995 remand results represents the *CIT's* views on what methodology should be used. It was the CIT which ordered Commerce to forego use of the *Federal-Mogul* methodology which Commerce had used in its Final Determination and to use instead the *Torrington* methodology.

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[16] Pursuant to CIT remand orders, Commerce issued unpublished remand results in September, 1994 and June, 1995. These results are set forth in Appendices G and H.

[17] *See* footnote 15, *supra*. Commerce could hardly say otherwise since it has uniformly used the *Federal-Mogul* methodology since the CIT's prohibition against its use was lifted by the CAFC. *See* cases cited at footnote 13, *supra*. In light of these cases, for Commerce to adopt an inconsistent approach in the CEMEX case alone would be arbitrary and capricious. *See Saha Thai Stell Pipe Co. v. United States*, 879 F. Supp. 1331, 36 (Ct. Int'l Trade 1995); *Shikoku Chemical Corp. v. United States*, 795 F. Supp. 417, 421-22 (Ct. Int'l Trade, 1992).

Finally, 19 U.S.C. § 1516a(b) provides in relevant part that a decision contained in the Final Determination (*i.e.*, the use of the *Federal-Mogul* methodology contained in the April 28, 1993 Final Determination) must be affirmed by the CAFC unless it is contrary to law. *See, e.g., Torrington Co. v. United States*, 82 F.3d 1039, (Fed. Cir. 1996); *Koyo Seiko Co. v. United States*, 36 F.3d 1565, 1570 (Fed. Cir. 1994); *PPG Industries v. United States*, 978 F.2d 1232, 1236 (Fed. Cir. 1992).

II. THE "LAW" HERE INCLUDES THE CAFC'S DECISION HOLDING THAT THE *FEDERAL-MOGUL* METHODOLOGY IS IN ACCORDANCE WITH LAW.

The next issue is whether the "law" which this CAFC panel was to apply in this case included a decision of another CAFC panel—namely the CAFC decision in *Federal-Mogul II* upholding the *Federal-Mogul* methodology. The answer to this issue is clear. It is a firm rule throughout Federal circuit courts, including the CAFC, that one panel cannot overrule a precedent established by an earlier panel of the same court absent a contrary opinion of the Supreme Court or the same circuit court sitting en banc. *Newell Cos., Inv. v. Kenney Mfg. Co.*, 864 F.2d 757, 765 (Fed. Cir. 1988) ("This court has adopted the rule that prior decisions of a panel of the court are binding precedent on subsequent panels unless and until overturned en banc.")[18] Since there is neither a Supreme Court nor an *en banc* decision contrary to *Federal-Mogul II*, the CAFC in this instance is bound to adhere to its own prior determination that the *Federal-Mogul* methodology was in accordance with law.

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[18] *See also, Zenith Radio Corp. v. United States*, 788 F.2d 184 (Fed. Cir. 1986), *Williams v. Ashland Eng'g Co.*, 45 F.3d 588, 592 (1st Cir. 1995); *Reich v. D.M. Sabia Co.*, 90 F.3d 854 (3d Cir. 1966); *Wilson v. Taylor*, 658 F.2d 1021, 1034 (5th Cir. 1981); *United States v. Love*, 19 F.3d 415 (8th Cir. 1994); *United Scottish Ins. Co. v. United States*, 614 F.2d 188, 191 (9th Cir. 1979); *United States v. Machado*, 804 F.2d 1537, 1543 (11th Cir. 1986); *Rose v. Silver*, 398 A.2d 310 (D.C. 1971).

III. THE CAFC'S 1995 AFFIRMANCE OF THE *FEDERAL-MOGUL* METHODOLOGY APPLIES TO COMMERCE'S FINAL DETERMINATION IN THIS CASE.

The next issue is whether the CAFC's affirmance of the *Federal-Mogul* VAT methodology in its 1995 decision in *Federal-Mogul II* applies to judicial review of the issue of the VAT methodology in this case. The answer is that it does, whether or not this is seen as a "retroactive" application.

First, when viewed from the standpoint of the controlling statutes, *Federal-Mogul II* is not being retroactively applied here. 19 U.S.C. § 1516a(a) provides for judicial review of Commerce's 1993 Final Determination. That Final Determination used the *Federal-Mogul* methodology. In 1994, the CIT in *Federal-Mogul I* found the *Federal-Mogul* methodology not in accordance with law. Later in 1994, the CIT, relying on *Federal-Mogul I*, ordered Commerce not to use the *Federal-Mogul* methodology in this case and ordered that Commerce use instead the *Torrington* methodology. Then in 1995, while this case was pending before the CAFC, the CAFC in *Federal-Mogul II* overturned the CIT's decision in *Federal-Mogul I*.

Thus, the CAFC's *Federal-Mogul II* decision was no more "retroactive" than the CIT's *Federal-Mogul I* decision. Both followed Commerce's 1993 Final Determination, and both preceded the CAFC's 1996 decision in this case. Since *Federal-Mogul II* "canceled" *Federal-Mogul I*, the CAFC should have affirmed Commerce's 1993 decision to use the *Federal-Mogul* methodology.

Even if the use of *Federal-Mogul II* were considered to be a "retroactive" application of the law, it still must be applied here. Since *Federal-Mogul II* was issued prior to the CAFC's determination in this case, it was binding precedent that should have been followed by this CAFC

panel. This Court has repeatedly ruled that it is clear error to refuse to apply a rule of federal law retroactively after the case announcing the rule has already done so. *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 540 (1991) ("*Beam*"); *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86 (1993). Specifically, in *Beam*, this Court held that:

> when the Court has applied a rule of law to the litigants in one case it must do so with respect to all others not barred by procedural requirements[19] or res judicata. *Beam*, 501 U.S. at 544.[20]

Thus, binding judicial decisions become effective the date they are issued, and all pending cases are required to follow the new interpretation, particularly if the new

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[19] In *Beam* the Court instructed that it was referring to statutes of limitation or repose when it referred to "procedural requirements." 501 U.S. at 541.

[20] Even before *Beam* it was well-settled that judicial decisions operate retroactively while congressional enactments and administrative rules generally apply prospectively. *See, United States v. Security Industrial Bank*, 459 U.S. 70, 79 (1982); *Simmons v. Lockhart*, 931 F.2d 1226, 1230 (8th Cir. 1991); *Smith v. Petra Cablevision Corp.*, 793 F. Supp. 417, 428-30 (E.D.N.Y. 1992). The CAFC followed *Beam* in *Newport News Shipbuilding & Dry Dock Co. v. Garrett*, 6 F.3d 1547, 1554 (Fed. Cir. 1993), and the reasoning in *Beam* has been universally adopted by the other Federal Circuits. *See, e.g., Bennett v. United States Lines*, 64 F.3d 62, 67 (2d Cir. 1995); *Lambert v. Genessee Hosp.*, 10 F.3d 46, 52 (2d Cir. 1993); *Graham v. IRS (In re Graham)*, 973 F.2d 1090, 1102 (3d Cir. 1992); *Fairfax Covenant Church v. Fairfax County Sch. Bd.*, 17 F.3d 703, 710 (4th Cir. 1994), *cert. denied*, 114 S. Ct. 2166 (1994); *Sterling v. Block*, 953 F.2d 198, 200 (5th Cir. 1992); *Garner v. Memphis Police Dept.*, 8 F.3d 358, 362-63 (6th Cir. 1993), *cert. denied*, 510 U.S. 1177 (1994); *Bell v. Trustees of Purdue Univ.*, 975 F.2d 422 (7th Cir. 1992); *Bottineau Farmers Elevator v. Woodward-Clyde Consultants*, 963 F.2d 1064, 1075 (8th Cir. 1992); *During v. Citibank Int'l*, 990 F.2d 1133, 1136 (9th Cir. 1993); *Olcott v. Delaware Flood Co.*, 76 F.3d 1538, 1547-48 (10th Cir. 1996); *Vance v. Southern Bell Tel. & Tel. Co.*, 983 F.2d 1573 (11th Cir. 1993), *cert. denied*, 115 S. Ct. 1110 (1995).

judicial interpretation warrants a different result. *Id.; Hormel v. Helvering,* 312 U.S. 552, 558-59 (1941); *Vandebark v. Owens-Illinois Glass Co.,* 311 U.S. 538, 543 (1941) ("[i]ntervening and conflicting decisions will thus cause reversal of judgments which were correct when entered."); *Kinkaid v. Rusk,* 670 F.2d 737, 745 (7th Cir. 1982) (intervening appellate ruling necessitated reversal of district court); *McGhee v. Draper,* 639 F.2d 639, 654-55 (10th Cir. 1981) (same); *Key v. Rutherford,* 645 F.2d 880, 883 (10th Cir. 1981) ("absent manifest injustice, the appeals court [should] take notice of intervening decision and apply the law in effect at the time the appeal is to be decided"); *Hegger v. Green,* 646 F.2d, 22, 26 (2d Cir. 1981) (federal court sitting in diversity must apply governing state law and abide by intervening decisions handed down by state's highest court even where this results in reversal of the lower court); *Nelson v. Brunswick Corp.,* 503 F.2d 376, 381 (9th Cir. 1974) (same).

Beam refers to the three factor test for deciding whether to retroactively apply a subsequent decision that the Court had earlier described in *Chevron Oil Co. v. Huson,* 404 U.S. 97 (1971). Whether, in light of the majority holding in *Beam,* the three part *Chevron* test remains necessary is not clear. If it is necessary, however, it is clear that the three *Chevron* factors are met in this case

The first *Chevron* factor is whether the decision to be applied retroactively establishes a clear new principle of law by overruling clear past precedent. Here, *Federal-Mogul II* directly overrules *Federal-Mogul I.* The second *Chevron* factor is whether retroactive application of the new decision will retard its operation. Here *Federal Mogul II* was specifically intended to return the law to what it had been prior to the CIT's issuance of *Federal-Mogul I* a year earlier. Finally, the third *Chevron* factor requires a weighing of the equities and inequities of retroactive application. "Retroactive" application of *Federal-*

Mogul II will simply here permit Commerce's use of the *Federal-Mogul* methodology in its Final Determination to be found in accordance with law. This in turn will prevent CEMEX from having higher antidumping duties assessed on its cement than is required by the antidumping statute. This is equitable for CEMEX and not inequitable for Commerce.[21]

IV. NO "WAIVER" OPERATES HERE TO PENALIZE CEMEX BY PREVENTING APPLICATION OF *FEDERAL-MOGUL II*.

In the CIT's first decision in this case it ordered that, in light of *Federal-Mogul I*, Commerce could not use the *Federal-Mogul* methodology but must use the *Torrington* methodology. At that point, the *Torrington* methodology was the law of this case. Thereafter, CEMEX argued for adjustments to the *Torrington* methodology. In its remand decision, CEMEX's argument was rejected by the CIT. A month after completion by the CIT of its phase of judicial review, the CAFC in *Federal-Mogul II* reversed *Federal-Mogul I* and upheld use of the *Federal-Mogul* methodology. Yet a year later the CAFC found CEMEX had an obligation to raise "any objection it may have had" to use of the *Torrington* methodology when the CIT deemed proper, and that, by failing to timely object, CEMEX "waived its right" to seek to return to the *Federal Mogul* methodology used in Commerce's Final Determination.

The CAFC's decision is contrary to decisions of other U.S. Circuit Courts. In *General Beverage Sales Co. v. East-Side Winery*, 568 F.2d 1147, 1152 (7th Cir. 1978),

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[21] The CAFC and CIT have repeatedly held that the purpose of the antidumping law is remedial, not punitive, in nature. *See, e.g., Badger-Powhatan v. United States*, 608 F. Supp. 653, 656, (Ct. Int'l Trade 1985); *Chaparral Steel Co. v. United States*, 901 F.2d 1097, 1103 (Fed. Cir. 1990); *Nat'l Knitware & Sportsman Assoc. v. United States*, 779 F. Supp. 1364, 1373 (Ct. Int'l Trade 1991).

the Seventh Circuit held that failure to object does not bar appellate review where the applicable law had changed in the interim. In *Key v. Rutherford*, 645 F.2d 880, 882-3 (10th Cir. 1981), the Tenth Circuit reached the same result. In *Hegger v. Green*, 646 F.2d 22, 27 (2d Cir. 1981), the Second Circuit also reached the same result, noting that a holding like the CAFC's in this case would frustrate the "well-established rule" that judicial decisions are applied retroactively and would result in the application of intervening appellate decisions "only in those rare cases where counsel had the foresight to predict the change." In *Phillips v. Cameron Tool Corp.*, 950 F.2d 488, 491 (7th Cir. 1991), the Seventh Circuit noted that a holding like the CAFC's in this case would "require a party to be clairvoyant; parties need not state numerous objections to settled law in hopes that something may change while an appeal is pending. In *United States v. Scott*, 425 F.2d 55, 57-58 (9th Cir. 1970), the Ninth Circuit noted that "were we to insist that an exception be taken to save the point for appeal, the unhappy result would be that we would encourage defense counsel to burden district courts with repeated assaults on the then settled principles out of hope that those principles will be later overturned."

Finally, the Court in *Beam* provided an over-arching description of why an otherwise applicable precedent should not be denied application by barriers such as the "waiver" concept used in the CAFC's decision.

> Nor, finally, are litigants to be distinguished for choice-of-law purposes on the particular equities of their claims to prospectivity: whether they actually relied on the old rule and how they would suffer from retroactive application of the new. It is simply in the nature of precedent, as a necessary component of any system that aspires to fairness and equality, that the substantive law will not shift and spring on such a basis. . . Once retroactive application is chosen for

any asserted new rule, it is chosen for all others who might seek its prospective application. *Beam*, 501 U.S. at 544.

CONCLUSION

In order to both ensure the equitable application of controlling law in this case, and to ensure proper application of future judicial decisions, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 27, 1996

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

95-1485

THE AD HOC COMMITTEE OF AZ-NM-TX-FL PRODUCERS OF GRAY PORTLAND CEMENT,
Plaintiff-Appellee,

v.

THE UNITED STATES,
Defendant-Appellee,

and

CEMEX, S.A.,
Defendant-Appellant.

DECIDED: August 1, 1996

Before MAYER, *Circuit Judge*, NIES, *Senior Circuit Judge*, and LOURIE, *Circuit Judge*.

LOURIE, *Circuit Judge*.

DECISION

CEMEX, S.A. appeals from final decisions of the United States Court of International Trade affirming actions of the Department of Commerce. In particular, the court held that CEMEX waived its right in this case to challenge Commerce's application of the so-called Torrington [1] methodology for calculating value-added taxes ("VAT") and that CEMEX's presale transportation ex-

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[1] *See Torrington Co. v. United States*, 853 F. Supp. 446, 448-49 (Ct. Int'l Trade 1994).

penses were not deductible in the determination of foreign market value. *Ad Hoc Comm. of AZ-NM-TX-FL Producers of Gray Portland Cement v. United States,* No. 95-125 (Ct. Int'l Trade July 12, 1995) (judgment after remand finding a waiver by CEMEX); *Ad Hoc Comm. of AZ-NM-TX-FL Producers of Gray Portland Cement v. United States,* No. 95-91 (Ct. Int'l Trade May 15, 1995) (decision sustaining the Department of Commerce's treatment of presale transportation expenses as indirect and hence not deductible, and remanding for recalculation of VAT). Because the court did not err in determining that there was a waiver and in refusing to allow a deduction for presale transportation expenses, we *affirm.*

DISCUSSION

On April 28, 1993, the International Trade Administration of the Department of Commerce issued the final results of the first administrative review of an antidumping duty order. *Gray Portland Cement and Clinker from Mexico,* 58 Fed. Reg. 25,803 (1993). Both CEMEX and the Ad Hoc Committee filed separate complaints in the Court of International Trade and these complaints were consolidated. The Ad Hoc Committee specifically challenged Commerce's results relating to determination of VAT and to the deductibility of presale transportation expenses from foreign market value.

The Court of International Trade held that Commerce's use of its then-current VAT methodology in determining the final results and deduction of CEMEX's presale transportation expenses pursuant to Commerce's inherent authority to fill "gaps" in the antidumping statute were contrary to law. The court remanded for Commerce to recalculate the dumping margins using an alternative VAT methodology and to determine if CEMEX's claimed presale transportation expenses were entitled to be deducted from foreign market value under the circumstances of sale provision of the statute. *See* 19 U.S.C.

§ 1677b(a)(4)(B) (1988). On appeal after remand, the Court of International Trade affirmed Commerce's treatment of CEMEX's claimed presale transportation expenses as indirect and therefore ineligible for deduction from foreign market value as a circumstances of sale adjustment. The court also approved Commerce's alternative VAT methodology, but remanded again, this time for Commerce to consider different VAT rates. On appeal after this second remand, the court affirmed Commerce's adjustment to VAT. The court, in response to CEMEX's objection to Commerce's use of the so-called Torrington VAT methodology in the second remand, also held that CEMEX had failed to timely object to the Torrington methodology and had thus waived its right to challenge that methodology on appeal from the second remand. CEMEX now appeals both issues to this court.

We review the Court of International Trade's decisions in a dumping case by applying anew the statutory standard of review. *See Atlantic Sugar, Ltd. v. United States*, 744 F.2d 1556, 1559 n.10 (Fed. Cir. 1984). We may thus reverse a decision of Commerce only if it was unsupported by substantial evidence or if it was not in accordance with law. 19 U.S.C. § 1516a(b) (1994). We review procedural matters on an abuse of discretion basis.

A. *Waiver.*

The issue of the Torrington methodology [2] arose when the Court of International Trade made its second remand to Commerce and instructed Commerce to employ that methodology for calculation of VAT rates. CEMEX objects to use of that methodology and argues that it timely objected to its use and therefore did not waive its right to challenge it. Specifically, CEMEX argues that, during the hearing in question before the Court of International Trade and prior to the remand, the word "Torrington"

[2] The details and nature of the Torrington methodology are not material to understanding our decision.

was not mentioned and that the court expressed disinterest in the VAT methodology issue. Thus, CEMEX asserts that it was not on notice that the Torrington methodology would be used and should not have been expected to object to it. The government, on the other hand, argues that CEMEX did not object to application of the Torrington methodology during the hearing in question at a time when it was understood that the court would remand for application of that methodology.

We agree with the government that CEMEX waived its right to object to application of the Torrington methodology. The Court of International Trade correctly found that CEMEX did not properly articulate its objection when it should have. The court found that CEMEX's challenges to the Torrington methodology were not raised until the remand proceeding at Commerce, that CEMEX never objected to the court's direction to apply that methodology on remand. The court did not err in its conclusion. Failure of the court to specifically refer to Torrington did not excuse CEMEX from raising any objection it may have had because the court had recently approved use of that methodology. *See Torrington Co. v. United States*, 853 F. Supp. 446, 448-49 (Ct. Int'l Trade 1994). CEMEX had reason to expect that Commerce would use it on remand. The court found that CEMEX itself made an affirmative statement accepting application of the Torrington methodology. In particular, the court found that CEMEX stated in a submission to Commerce on remand: "[Commerce] should . . . apply its new [*Torrington*-approved VAT] methodology in accordance with the Court's instructions." *Ad Hoc Comm.*, No. 95-91, slip op. at 10 (alteration in original). CEMEX has thus failed to show that the court abused its discretion in finding that CEMEX's objections to the Torrington methodology were untimely. Because we conclude that CEMEX did not timely object to application of the Torrington methodology, we need not here review the merits of Commerce's use of that VAT methodology. ***But see Federal***

Mogul Corp. v. United States, 63 F.3d 1572 (Fed. Cir. 1995) (addressing the merits of the Torrington methodology).

B. *Presale Transportation Expenses*

CEMEX argues that Commerce erred in classifying its presale transportation expenses as indirect selling expenses solely on the basis of the classification of its warehousing expenses as indirect. It asserts that Commerce's determination to analogize CEMEX's presale warehousing expenses to its presale transportation expenses was inappropriate.

The government and the Ad Hoc Committee argue that Commerce correctly determined that CEMEX was not entitled to a deduction for presale home market transportation costs. They argue that Commerce chose an appropriate methodology for determining whether to grant a circumstances of sale adjustment for presale home market transportation expenses, that Commerce acted reasonably and in accordance with law when it linked its analysis of home market transportation expenses to its analysis of home market warehousing expenses.

We agree that Commerce did not err in determining that CEMEX's presale transportation expenses were not deductible under the circumstances of sale provision. First, Commerce did not err in treating CEMEX's presale warehousing expenses as indirect. CEMEX certified, and Commerce verified, that CEMEX's warehousing expenses were indirect, and Commerce therefore had no reason on remand to solicit additional information regarding warehousing expenses. CEMEX failed to meet its burden of proving that such expenses were direct. Moreover, it is not illogical that if warehousing expenses are sufficiently disassociated from actual sales to be indirect, expenses of transportation to a warehouse are even less associated with actual sales and are therefore even less direct. In addition, Commerec did not rely solely on the warehous-

ing expenses. It simply made an analogy which CEMEX did not provide evidence or reason to refute. We therefore discern no error in Commerce's use of that analysis. Commerce's decision denying a deduction for CEMEX's presale transportation expenses was supported by substantial evidence and was not contrary to law.

APPENDIX B

Filed Oct. 7, 1996

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL COURT

95-1485

THE AD HOC COMMITTEE OF AZ-NM-TX-FL PRODUCERS OF GRAY CEMENT,
Plaintiff-Appellee,

v.

THE UNITED STATES,
Defendant,

and

CEMEX, S.A.,
Defendant-Appellant.

ORDER

A combined petition for rehearing and suggestion for rehearing in banc having been filed by the APPELLANT, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the suggestion for rehearing in banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the suggestion for rehearing in banc be, and the same hereby, is DECLINED.

The mandate of the court will issue on October 15, 1996.

FOR THE COURT,

/s/ Brian P. LeDuc
BRIAN P. LEDUC
Associate Chief Deputy Clerk

Dated: October 7, 1996

APPENDIX C

UNITED STATES COURT OF INTERNATIONAL TRADE

Court No, 93-05-00273 Consolidated

THE AD HOC COMMITTEE OF AZ-NM-TX-FL PRODUCERS OF GRAY PORTLAND CEMENT,
Plaintiff,

v.

THE UNITED STATES,
Defendant,

and

CEMEX, S.A.,
Defendant-Intervenor.

July 12, 1995, Decided

JUDGE: RESTANI

OPINION

The court has received the remand results required by Slip Op. 95-91 (May 15, 1995). Contrary to Cemex's objections all parties were aware that on remand the court was ordering ITA to apply its new methodology, which was approved in *Torrington Co. v. United States*, 853 F. Supp. 446, 448-9 (1994). As previously indicated, Cemex also affirmatively led ITA to believe it supported that approach. Cemex's new challenge to the ITA's VAT methodology is untimely. Accordingly, the remand results of June 13, 1995 are sustained.

Judge of the United States Court of International Trade.

Dated: This 12th day of July, 1995.

APPENDIX D

UNITED STATES COURT OF INTERNATIONAL TRADE

Consol. Court No. 93-05-00273

THE AD HOC COMMITTEE OF AZ-NM-TX-FL PRODUCERS OF GRAY PORTLAND CEMENT and NATIONAL CEMENT COMPANY OF CALIFORNIA,
Plaintiffs,

v.

THE UNITED STATES,
Defendant,

and

CEMEX, S.A.,
Defendant-Intervenor.

May 15, 1995, Decided

OPINION

RESTANI, Judge: This matter is before the court following a remand order. See *Ad Hoc Comm. of AZ-NM-TX-FL Producers of Gray Portland Cement v. United States,* 865 Supp. 857, 867 (Ct. Int'l Trade 1994) ("Ad Hoc I"). The court ordered the International Trade Administration of the United States Department of Commerce ("Commerce") to (1) reconsider its selection of particular best information available ("BIA") data for reclassified sales and added materials costs, (2) apply its new value-added tax ("VAT") adjustment methodology,

and (3) consider CEMEX, S.A.'s ("CEMEX") claimed deductions for its pre-sale home market transportation costs under the circumstances of sales ("COS") provision. CEMEX challenges Commerce's Final Results of Redetermination Pursuant to Court Remand ("Remand Results") dated January 5, 1995.[1]

A. Applicability of Adverse BIA to Reclassified ESP Sales

In Ad Hoc I, Commerce requested remand to correct its selection of BIA, asserting that

> use as BIA of the weighted-average of all the ESP adjustments to ESP sales properly reported by CEMEX resulted in Commerce, (a) not using actual expense data timely reported by CEMEX for certain ESP adjustments for these ESP sales, and (b) including certain adjustments that could not have been applicable to these ESP sales.

865 F. Supp. at 865-66. On remand, Commerce used the actual expense data for adjustments to the reclassified ESP sales and made no ESP adjustments other than those sales. Remand Results at 7. In addition, Commerce used as BIA the highest amount reported for indirect selling expenses, exclusive of further-manufacturing expenses, incurred on CEMEX's ESP transactions. *Id.*

As the court has found Commerce's application of adverse BIA to CEMEX to be appropriate, *Ad Hoc I*, 865 F. Supp. at 865, CEMEX's reassertion of arguments raised in Ad Hoc I are rejected. The court further rejects CEMEX's contention that Commerce's selection of BIA should have been made based upon geographical considerations. As CEMEX has not proven any unusual dis-

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[1] CEMEX does not challenge Commerce's reconsideration of its selection of BIA for added materials costs. CEMEX also does not contest Commerce's reclassification of three exporter's sales price ("ESP") transactions as purchase price ("PP") transactions. Thus, Commerce's redetermination as to these issues is sustained.

tortive effects of the selection, the court finds no error with Commerce's selection of BIA based on sales occurring outside of the regions in which the re-classified ESP sales were made. Commerce has broad discretion in determining the appropriate adverse BIA. Krupp Stahl *A.G. v. United States,* 822 F. Supp. 789, 792-93 (Ct. Int'l Trade 1993). Finding no other error, the court sustains Commerce's application of adverse BIA for CEMEX's indirect selling expenses for the reclassified ESP sales.[2]

B. Deduction of Pre-Sale Home Market Transportation Expenses

As to its second challenge, CEMEX contests Commerce's treatment of pre-sale home market transportation expenses as indirect expenses. In Ad Hoc I, the court approved of the deduction of pre-sale home market transportation expenses under the COS provision in ESP comparisons, subject to the ESP offset cap, and in PP comparisons if the expenses were shown to be directly related to sales in the home market. 865 F. Supp. at 862-63. Thus, the court remanded this issue to Commerce to determine to what extent CEMEX's pre-sale home market transportation expenses may be deducted as a COS adjustment in the calculation of foreign market value ("FMV"). *Id.* at 863.

In the final remand results, Commerce stated that

> in order to determine whether pre-sale movement expenses are direct, [Commerce] examines the respondent's pre-sale warehousing expenses, since the

[2] CEMEX also contests Commerce's "use of a per ton amount for indirect selling expenses, instead of a percentage average for all other indirects." Def. Int.'s Comments on Commerce's Final Remand Results at 9. As this argument was not raised in the underlying administrative review, the court will not permit CEMEX to raise this argument now.

> pre-sale movement charges incurred in positioning the merchandise at the warehouse are, for analytical purposes, inextricably linked to pre-sale warehousing expenses. If pre-sale warehousing is an indirect expense, then, in the absence of contrary evidence, pre-sale movement expenses should also be treated as an indirect expense.

Remand Results at 3. Commerce determined that CEMEX had not incurred any pre-sale warehousing expenses as a direct selling expense. In support of this finding, Commerce relied upon CEMEX's failure to claim any warehousing expenses as a direct selling expense under the COS provision, and CEMEX's statement, in its December 23, 1991 questionnaire response, that it incurred no post-sale warehousing expenses.[3] *Id.* Consequently, Commerce treated "the expense of transporting the cement to the warehouse . . . as an indirect expense." *Id.*

CEMEX contends that classifying pre-sale transportation expenses on the basis of the direct or indirect nature of pre-sale warehousing expenses is erroneous. CEMEX asserts that in order to be entitled to a COS adjustment for a direct sales expense, all it need establish is that the expense is related to sales of the subject merchandise in the home market. CEMEX does not recognize a category of non-allowable indirect sales expenses (for PP comparisons).

Commerce, on the other hand, attempts to make distinctions between direct and indirect sales expenses.[4] First, it

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[3] In addition, CEMEX listed "warehousing expenses of cement plants" in its calculation of indirect selling expenses in its April 30, 1992 supplemental questionnaire response. See Apps. to Pls.' Br. Resp. Def.-Int's. Comments on Commerce's Remand Results, App. J at 24, App. K.

[4] See 19 C.F.R. § 353.56(a)(1) (1993). That regulation provides, in pertinent part, that

> in calculating [FMV], [Commerce] will make a reasonable allowance for a bona fide difference in the circumstances of the

is more likely that post-sales expenses will be considered direct, as actual sales can be identified once they exist. Second, Commerce does recognize certain pre-sale expenses as direct, but such circumstances are limited. For freight and warehouse expenses, those circumstances usually involve products channeled or customized for certain buyers.[6] Commerce concluded that CEMEX did not establish that pre-sale warehousing expenses were a direct expense, thus, in the absence of evidence to the contrary, expenses incurred in "transporting the cement to the warehouse [was] also not shown to be a direct expense." *See Ad Hoc Comm. of AZ-NM-TX-FL. Producers of Gray Portland Cement v. United States,* Slip Op. 94-152, at 3 (Sept. 26, 1994); accord *Torrington Co. v. United States,* Slip Op. 94-168, at 7 Oct. 21, 1994) (agreeing that in a PP comparison, "if the pre-sale warehousing expense is not shown to be a direct expense, then it follows that the pre-sale freight expense is also not shown to be a direct expense"). The court perceives no conflict with the statute or regulations in the application of this particular approach to this case.

As to procedure, CEMEX argues that it never had the opportunity to present evidence as to the direct/indirect

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> sales compared. . . . . In general, [Commerce] will limit allowances to those circumstances which bear a direct relationship to the sales compared.

Id.

[6] See Stainless Steel Bar from Italy, 59 Fed. Reg. 66,921, 66,928 (Dep't Comm. 1994) (final determ. of less than fair value ("LFTV") sales) (allowing COS adjustment where pre-sale warehousing expenses incurred for designated amount of subject merchandise with certain specifications for particular customers); Polyethylene Terephthalate Film, Sheet, and Strip from Japan, 56 Fed. Reg. 16,300, 16,303 (Dep't Comm. 1991) (final determ. of LTFV sales) (allowing COS adjustments for pre-sale warehousing expenses found to be directly related to sales on basis that expenses incurred and reported for specific products sold to specific customers).

nature of its warehousing expenses, despite repeated requests by CEMEX that Commerce permit submission of such data on remand. CEMEX admits that it could have claimed pre-sale warehousing expenses as a direct expense in the original review proceeding.[6] See Def.-Int's Comments on Commerce's Final Remand Results at 16. At that time, however, ex-factory to ex-factory comparisons were allowed by Commerce, so the indirect versus direct expense distinction was not generally material. Nevertheless, it became very material on remand.

In view of the classification of warehouse expenses as indirect in questionnaire responses in the original review proceeding, and the court's approval of the linking of transportation and warehousing expenses, CEMEX had the burden to support unlinking the expenses or classification of warehousing expenses as direct. On remand, Commerce accepted all of CEMEX's submissions, over petitioners' objections. Further, CEMEX submitted a coherent explanation of its views. This is not an issue on which a record was not made. Although Commerce did not ask for quantification of warehousing expenses, there is no evidence that it would not accept and consider any explanation CEMEX wished to submit that would have made quantification relevant.

As to substance, CEMEX contends that it submitted data supporting the conclusion that its pre-sale warehousing and transportation expenses were directly related to the sales of cement in the home market. Specifically, in its

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[6] With respect to COS adjustments, Commerce's original questionnaire provided that: "To the extent the circumstances of sale, and thereby selling expenses, vary in connection with your domestic and U.S. sales, some adjustment may be appropriate." Def.'s Resp. Def.-Int.'s Comments on Commerce's Final Remand Results at 25 n.9. According to CEMEX, at the time of filing of its December 23, 1991 questionnaire response, Commerce allowed a COS adjustment for pre-sale warehousing expenses in only one instance. See supra note 5; Polyethylene Terephthalate Film, 56 Fed. Reg. at 16,303.

October 19 and December 5, 1994 submissions, CEMEX argued that, under its cement distribution system, warehousing of cement was dedicated to serving the demands of particular customers, thus pre-sale movement expenses could be directly tied to sales to those customers. See Admin. Pub. Doc. 2, at 24-26; Doc. 15, at 29-32. Commerce, however, was not persuaded by CEMEX's only proffered example in support of its argument.

CEMEX asserted that all sales during the period of Type II cement from its Guadalajara terminal were made to a single customer, with the exception of certain cement sold in June 1991. See Admin. Conf. Doc. 1, at 22. This, according to CEMEX, sufficiently established a direct relationship to sales of the subject merchandise. In the final results, however, Commerce determined that the Guadalajara "terminal acted as a distribution terminal from which regional orders were filled." Remand Results at 24. This is an acceptable view of the record evidence. Thus, the court finds that it was not error to reject CEMEX's attempt to treat all transportation expenses for shipment to certain customers as one continuous direct expense, despite pre-sale stops at warehouses.

Finally, in its submissions to Commerce, CEMEX failed to provide data segregating pre-sale and post-sale freight expenses for home market sales from its Atotonilco terminal to the ultimate customer. As a result, Commerce treated these expenses as indirect selling expenses. CEMEX contends that, pursuant to its request on remand, Commerce should have used other reported data as a proxy for the missing data. The court disagrees. As CEMEX failed to explain why the missing expense data could not be provided, the court finds that Commerce was justified in treating these expenses an indirect expenses.

C. VAT Adjustment

In *Ad Hoc I*, 865 F. Supp. at 863, the court directed Commerce to apply its new VAT methodology as approved

in *Torrington Co. v. United States*, 853 F. Supp. 446, 448-49 (Ct. Int'l Trade 1994). Accord, e.g., *Independent Radionic Workers v. United States*, 862 F. Supp. 422, 426 (Ct. Int'l Trade 1994) (approving Commerce's new VAT methodology). Commerce followed the court's direction. CEMEX now requests that the court reconsider its approval of Commerce's new methodology. The court declines to do so, as CEMEX did not address this issue in a timely manner.

Specifically, CEMEX contests the secondary adjustment in the new VAT methodology where Commerce "adjusts . . . the foreign market tax and the USP tax adjustment" to account for expenses deducted in calculating FMV and USP. See Remand Results at 4-5. CEMEX's challenges, however, to Commerce's application of its new VAT methodology were not raised until the remand proceedings in this case. CEMEX also never raised objection to the court's direction for Commerce to apply, on remand, the Torrington-approved VAT methodology.[7] On the contrary, in a submission to Commerce on remand, CEMEX made an affirmative statement of support for the Torrington-approved methodology. See Admin. Pub. Doc. 2, at 6 ("[Commerce] should . . . apply its new [Torrington-approved VAT] methodology in accordance with the Court's instructions.") Thus, the court will not here consider for the first time general challenges to that methodology.

As to the specific application of Torrington to these facts, CEMEX had an obligation, before it supported Torrington or acquiesced in it, to examine application of the

[7] At oral argument prior to remand, the court indicated it would direct Commerce to apply its new VAT methodology as used in the Avesta cases and the cases decided by the judge in Torrington. *See Avesta Sheffield, Inc. v. United States*, Slip Op. 94-53 (Mar. 31, 1994), *remand determ. aff'd*, Slip Op. 94-99 (June 14, 1994); *Torrington*, 853 F. Supp. at 448-49. All parties apparently understood that the VAT methodology was the one described in Torrington, which was decided the previous May.

new VAT methodology to its product if it wanted to claim an exception from the methodology for this case. CEMEX's attempts to challenge the new AT methodology now are untimely. In any case, the alleged odd effects created by the new VAT methodology are limited, even for CEMEX.

CEMEX further contends that Commerce should have used a weighted-average VAT rate, rather than a flat 15 percent VAT rate. According to CEMEX, during the period of review, the applicable VAT rate was either 15 percent or 6 percent. In the final remand results, Commerce elected to use the 15 percent VAT rate "since this rate applies to almost all home market destinations." [8] Remand Results at 13-14. The court orders recalculations to account for the 6 percent transactions.

D. Correction of Computer Errors

CEMEX requests that the court remand Commerce's remand determination for correction of inadvertent computer programming errors with regard to profit and the ESP offset cap. As these errors existed prior to the court's remand order, CEMEX's claims are rejected.

CEMEX additionally argues that a new error resulted from Commerce's failure to re-run PP margin calculations after correction of errors to the ESP program. Commerce does not oppose correction of this error. Thus, the court remands this issue to Commerce for recalculation.

CONCLUSION

Commerce's remand determination is sustained as to selection of BIA for CEMEX's indirect expenses for the reclassified ESP sales. Commerce's treatment of pre-sale transportation expenses as indirect expenses is also sus-

[8] On remand, petitioners requested that the 15 percent rate or the weighted-average VAT rate be applied. Remand Results at 13.

tained. Commerce is directed to recalculate CEMEX's VAT adjustment to account for CEMEX's lower VAT percentage transactions. Commerce is further directed to recalculate CEMEX's PP margin calculations.

Remand results are due within 30 days hereof. The parties will be deemed to have no objection to the recalculations unless the objections are filed within 5 days of filing of the remand results.

Jane A. Restani.
JUDGE

Dated: New York, New York, This 15th day of May 1995.

APPENDIX E

UNITED STATES COURT OF INTERNATIONAL TRADE

Consolidated Court No. 93-05-00273

THE AD HOC COMMITTEE OF AZ-NM-TX-FL PRODUCERS OF GRAY PORTLAND CEMENT and NATIONAL CEMENT COMPANY OF CALIFORNIA,
Plaintiffs,

v.

THE UNITED STATES,
Defendant,

and

CEMEX, S.A.,
Defendant-Intervenor.

September 26, 1994, Decided

OPINION

RESTANI, Judge: This matter is before the court on cross-motions for judgment on the agency record pursuant to USCIT R. 56.2. Plaintiffs, the Ad Hoc Committee of AZ-NM-TX-FL Producers of Gray Portland Cement and National Cement Company of California (collectively "the Committee") and defendant-intervenor, CEMEX, S.A. ("CEMEX"), challenge the results of the first administrative review of the antidumping order in Gray Portland Cement and Clinker from Mexico, 58 Fed. Reg. 25,803

(Dep't Comm. 1993) (final admin. review). The issues presented are whether pre-sale home market transportation costs should have been deducted in the calculation of foreign market value ("FMV"), whether the value-added tax ("VAT") adjustment was proper, whether best information available ("BIA") should have been applied to CEMEX, and whether the BIA rate chosen was proper.

Background

On August 30, 1990, the International Trade Administration of the United States Department of Commerce ("Commerce") issued an antidumping order covering entries of gray portland cement and clinker from Mexico. Gray Portland Cement and Clinker from Mexico, 55 Fed. Reg. 35,443 (Dep't Comm. 1990) (antidumping duty order). A margin of 58.38 percent was applied to CEMEX. *Id.*

On September 18, 1991, Commerce initiated its first administrative review of the antidumping order, covering entries from April 12, 1990 through July 31, 1991. On March 6, 1992, the Committee filed a complaint with Commerce alleging that during the review period CEMEX created fictitious home market sales within the meaning of 19 U.S.C. §§1677b(a)(1), (5) (1988). See Pls.' Conf. App., App. B.

On April 28, 1993, Commerce issued the final determination of the first review, applying a revised dumping margin of 30.44 percent for CEMEX and reaching a negative determination on the fictitious market issue. 58 Fed. Reg. at 25,803-04, 25,810.[1] On May 13, 1993, CEMEX filed an action challenging the final determination. On May 19, 1994, the Committee filed a separate action challenging Commerce's final determination as to re-

[1] After correction for clerical errors, the margin increased to 40.72 percent. Gray Portland Cement and Clinker from Mexico, 58 Fed. Reg. 49,471 (Dep't Comm. 1993) (amended final admin. review).

spondent CEMEX. These actions were consolidated on June 16, 1993.

On November 30, 1993, the Committee moved for judgment on the agency record pursuant to USCIT R. 56.2. See USCIT R. 56.2. On April 18, 1994, CEMEX cross-moved for judgment on the agency record.[2] On the same date, CEMEX also moved to strike certain sections of the Committee's brief relating to the Committee's fictitious market argument.

The Committee had initially raised four arguments in its motion for judgment on the agency record: a/ CEMEX created a fictitious market; b/ Commerce erred in calculating CEMEX's cost of production by offsetting CEMEX's interest expense with a hypothetical monetary position gain; c/ Commerce erred in calculating FMV by deducting CEMEX's pre-sale home market transportation expenses; and d/ Commerce erred in adjusting for VAT by adding an absolute tax to the United States Price ("USP").[3]

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[2] CEMEX's brief is entitled "Memorandum in Support of Points Raised in [its] Complaint," but is properly considered a motion for judgment on the agency record.

[3] USP, exporter's sales price ("ESP") and purchase price ("PP") are defined at 19 U.S.C. § 1677a (1988):

> (a) United States price
>
> . . . The term "United States price" means the purchase price, or the exporter's sales price, of the merchandise, whichever is appropriate.
>
> (b) Purchase price
>
> . . . "Purchase price" means the price at which merchandise is purchased, or agreed to be purchased, prior to the date of importation, from a reseller or the manufacturer or producer of the merchandise for exportation to the United States.
>
> (c) Exporter's sales price
>
> . . . "Exporter's sales price" means the price at which merchandise is sold or agreed to be sold in the United States, before or after the time of importation, by or for the account of the exporter . . ."

The Committee has withdrawn its fictitious market and monetary position gain arguments as a result of Commerce's second review, Gray Portland Cement and Clinker from Mexico, *58 Fed. Reg. 47,253, 47,255* (Dep't Comm. 1993) (final) (excluding CEMEX's home market sales of Type II cement from calculation of FMV because outside ordinary course of trade), and the Federal Circuit's holding in *Ad Hoc Comm. of AZ-NM-TX-FL Producers of Gray Portland Cement v. United States*, 13 F.3d 398 (Fed. Cir. 1994) (finding no inherent authority for ITA to deduct pre-sale home market transportation expenses from FMV).[4] Thus the remaining issues presented by the Committee are: a/ the limits on deduction of home market pre-sale transportation costs following Ad Hoc, and b/ VAT adjustment.[5]

CEMEX raises two arguments in its motion for judgment on the agency record: a/ Commerce erred in applying adverse BIA to the reclassified ESP sales, and b/ Commerce improperly applied BIA in calculating added materials costs for further manufactured concrete products.

Standard of Review

On a motion for judgment on the agency record, the scope of review of Commerce's determination is whether it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1988). Substantial evidence is "such relevant evidence as a reasonable mind might accept

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[4] As the fictitious market argument has been withdrawn, CEMEX's motion to strike is denied as moot.

[5] All parties agree that the court should remand the case to Commerce for reconsideration of Commerce's treatment of CEMEX's pre-sale home market transportation costs and recalculation for VAT adjustment, but disagree as to the instructions for reconsideration. See Pls.' Reply Br. Supp. Mot. J. Agency R. at 2; Def.'s Mem. Opp'n Pls.' Mot. J. Agency R. at 16-17; Def.-Int.'s Mem. Opp'n Pls.' Mot. J. Agency R. at 21, 28.

as adequate to support a conclusion." *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229, 83 L. Ed. 126, 59 S. Ct. 206 (1938)).

Discussion

A. Deduction of Pre-sale Home Market Transportation Expenses

As provided under 19 U.S.C. § 1677b(a)(4)(B).

> in determining [FMV], if it is established to the satisfaction of the administering authority that the amount of any difference between the [USP] and the [FMV] (or that the fact that the [USP] is the same as the [FMV]) is wholly or partly due to—
>
> . . . .
>
> (B) other differences in circumstances of sale; . . . .
>
> then due allowance shall be made therefor.

19 U.S.C. § 1677b(a)(4)(B) (1988). Commerce's implementing regulation generally requires a direct relationship between the expenses and the particular sales at issue before FMV may be adjusted. 19 C.F.R. § 353.56(a) (1993). For ESP comparisons, a circumstances of sale ("COS") adjustment is permitted for indirect expenses. Id. § 353.56(b)(2); see *Consumer Prods. Div. v. Silver Reed America, Inc.*, 753 F.2d 1033, 1035-36 (Fed. Cir. 1985).[6] The regulation also provides for an ESP offset cap that, for ESP comparison purposes, caps the COS adjustment for indirect expenses at the level of indirect expenses incurred in the United States market. 19 C.F.R. § 353.56(b)(2).

The court first considers the Committee's claim that Commerce improperly deducted pre-sale home market

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[6] Silver Reed discusses an earlier version of 19 C.F.R. § 353.56 (b)(2). See 19 C.F.R. § 353.15(c) (1985).

transportation expenses [7] in calculating FMV. The Committee argues that the Federal Circuit's holding in Ad Hoc precludes Commerce from deducting any pre-sale home market transportation costs in calculating FMV for PP or ESP comparisons. Commerce responds that a remand is required for it to conform its analysis to the holding of Ad Hoc, but also that Ad Hoc does not prohibit Commerce from invoking the COS provision contained in 19 U.S.C. § 1677b(a)(4) to deduct pre-sale home market transportation costs from FMV. CEMEX supports Commerce's view.

The Federal Circuit in Ad Hoc presented the issue on review as: "Whether the [FMV] provision of the antidumping statute, 19 U.S.C. § 1677b, authorizes a deduction from [FMV] of pre-sale transportation costs within the exporting country for goods sold within that country." *Ad Hoc*, 13 F.3d at 400. In Ad Hoc, Commerce had deducted pre-sale home market transportation costs from FMV in a purchase price ("PP") comparison pursuant to its "inherent authority" to fill "gaps" in the antidumping statute. *Id.* at 400-01. The Federal Circuit stated, "That Congress included a deduction for transportation costs from USP but not from FMV leads us to conclude that Congress did not intend pre-sale home-market transportation costs to be deducted from FMV." *Id.* at 402.

This is admittedly a broad statement, but recently in *Torrington Co. v. United States*, 850 F. Supp. 7 (Ct. Int'l Trade 1994), the court concluded that Ad Hoc only applies to calculation of FMV in PP comparisons (where the distinction between direct and indirect expenses is most relevant).[8] 850 F. Supp. at 10. The Torrington

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[7] During the first review period, CEMEX incurred certain freight expenses in shipping cement from its home plants to home market distribution terminals, where the cement was stored prior to sale.

[8] As indicated, indirect sales expenses are deducted from FMV for ESP comparisons, but not for PP comparisons. See supra discussion pp. 6-7. While ESP transactions were present in the pro-

court further stated that the Ad Hoc court "specifically noted that it was not ruling on whether the ITA has authority to adjust FMV for pre-sale inland freight pursuant to the [COS] provision." *Id.* The Torrington court, however, did not consider whether Commerce may make such a deduction for PP comparison purposes under the COS provision. In the present case, the Committee argues that the Torrington court misinterpreted the holding in Ad Hoc and that the COS provision is not applicable.

This court cannot accept so broad an interpretation of the Federal Circuit's holding in Ad Hoc as the Committee would have. As noted in *Torrington*, 850 F. Supp. at 10, the Federal Circuit in Ad Hoc stated that "although intervenors urge that we affirm the Court of International Trade judgment under the 'circumstances of sale' provision, we decline the invitation. It is well settled that an agency's action may not be upheld on grounds other than those relied on by the agency." *Ad Hoc*, 13 F.3d at 401 n.8 (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 196, 91 L. Ed. 1995, 67 S. Ct. 1575 (1947)). Thus, the Ad Hoc court did not address the applicability of the COS provision to home market transportation costs in the calculation of FMV.

Furthermore, to apply Ad Hoc more broadly, that is, to both ESP and PP COS adjustments and perhaps to post-sale transportation expenses, as full application of the Ad Hoc rationale might,[9] would disregard Commerce's

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ceedings underlying the Ad Hoc litigation, the Court of Appeals indicated that ESP methodology was not at issue on appeal. See *Ad Hoc*, 13 F.3d at 399 n.2. ("In this case, Commerce used the purchase price approach.")

[9] As indicated, see supra p. 8, the Ad Hoc decision relied upon the provision for deduction of transportation costs from USP, and the lack of such language on the FMV side, compare 19 U.S.C. §§ 1677b(a)(1), (4) with 19 U.S.C. § 1677a(d)(2(A) (1988), but the court notes there is also no language concerning post-sale transportation costs on the FMV side. See *Ad Hoc*, 13 F.3d at 399 n.3, 401-02.

longstanding practice of deducting home market transportation costs under the COS provision.[10] This is a practice to which Congress has apparently acquiesced.[11] If, despite prior practice and Congressional inaction, the Ad Hoc court had intended to prohibit Commerce from deducting any home market transportation costs in calculating FMV for both ESP and PP comparisons, it would have made this intent clear. Instead, the court discussed, without disapproval, Commerce's ESP-COS procedures where, as indicated, indirect expenses, such as most pre-sale transportation costs, are deductible from FMV to the extent of the USP level of expenses. See *Ad Hoc*, 13 F.3d at 400; 19 C.F.R. § 353.56(b)(2). Therefore, the Ad Hoc court's conclusion can only be read properly in the context of the narrow question before it, that is, without a determination as to whether they are directly related to sales, may pre-sale transportation costs be deducted from FMV in the context of PP comparisons. Ad Hoc's answer to that question is "No."

In other post-Ad Hoc cases treating pre-sale home market transportation expenses, where Commerce had not conducted a COS analysis, the court has remanded the

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[10] See, e.g., Antifriction Bearings (Other than Tapered Roller Bearings) and Parts Thereof from the Federal Republic of Germany, 54 Fed. Reg. 18,992, 19,046 (Dep't Comm. 1989) (final determs. of less than fair value ("LTFV") sales); Butadiene Acrylonitrile Copolymer Synthetic Rubber from Japan, 53 Fed. Reg. 15,436, 15,438 (Dep't Comm. 1988) (final determ. of LTFV sales); Color Television Receivers from Korea, 53 Fed. Reg. 24,975, 24,988 (Dep't Comm. 1988) (final).

[11] Although Congress amended the antidumping statute in 1979, 1984 and 1988, no changes were made to the COS provision, at least arguably signalling Congressional approval of Commerce's application of the COS provision to deduct home market transportation costs in calculating FMV. See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381, 23 L. Ed. 2d 371, 89 S. Ct. 1794 (1969) (stating agency construction of statute should be given great weight, especially when "Congress has refused to alter the administrative construction").

case to Commerce with instructions to determine whether ITA had the statutory authority to deduct the transportation expenses from FMV in PP comparisons. E.g., *Torrington*, 850 F. Supp. at 10, 12; Federal-Mogul Corp. v. United States, Slip Op. 94-40, at 8 (Mar. 7, 1994); *Timken Co. v. United States*, 1994 Ct. Intl. Trade LEXIS 52, Slip Op. 94-41, at 5-6 (Mar. 7, 1994). Commerce has now fully analyzed this issue and applied COS methodologies in the PP context following remand of Ad Hoc. The court agrees that the statute, as well as Ad Hoc, leaves Commerce free to apply its COS methodology to pre-sale transportation costs in the PP context. *See supra* discussion of 19 U.S.C. § 1677(b), prior practice and legislative history.

The court now turns to the application of COS analysis to the facts of record here. In the present case, eleven of CEMEX's sales at issue are classified as ESP sales.[12] All parties have agreed from the outset that the pre-sale home market transportation costs may be deducted as indirect expenses under the COS provision for ESP sales comparisons (although the Committee also argues, somewhat inconsistently, that the holding in Ad Hoc now prevents this). See discussion supra.

For those sales classified as PP transportation,[13] the issue is whether the pre-sale home market transportation expenses are direct expenses, and thus may be deducted in calculation of FMV. CEMEX asserts that the pre-sale home market transportation expenses are tied directly to

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[12] Initially, Commerce had contended that CEMEX misclassified 14 ESP sales as PP transactions. Commerce now acknowledges that three of the 14 U.S. sales at issue were correctly classified by CEMEX as PP sales. These three sales are recorded on invoice numbers CA-1588, CA-1590 and CA-1596. Commerce requests a remand to make the appropriate corrections. Def.'s Mem. Opp'n Def.-Int.'s Mot. J. Agency R. at 10 n.10. CEMEX does not oppose Commerce's request.

[13] See supra note 12.

the PP sales at issue,[14] and are properly deducted from FMV under the COS provision. The regulations, however, do not provide any guidance in determining what constitutes "direct" expenses.[15] Furthermore, the case law to date has not specifically addressed deduction of pre-sale home market transportation expenses as direct or indirect expenses under the COS provision. On remand Commerce shall address this issue.[16]

In sum, as Ad Hoc held, Commerce does not have the "inherent authority" to deduct pre-sale home market transportation expenses in the calculation of FMV. Instead, the statute permits such expenses to be deducted as indirect expenses under the COS provision for ESP comparisons, subject to the ESP offset cap. For PP comparisons these expenses may be deducted from FMV under

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[14] CEMEX reported plant-by-plant freight factors on a peso per kilogram basis. CEMEX maintains that since all types of hydraulic cement are subject to the same freight rates from each plant, CEMEX's reported freight expenses are attributable solely to merchandise subject to the sales order, and can therefore be directly linked to the ESP sales at issue. Def.-Int.'s Mem. Opp'n Pls.' Mot. J. Agency R. at 26.

[15] CEMEX's citation to the legislative history of amendments to the original antidumping statute in Antidumping: Hearings on H.R. 6006 Before the Senate Comm. on Finance, 85th Cong., 2d Sess. 19 (1958) (explanatory mem. of Treasury Dep't), does not offer further clarification. See Def.-Int.'s Mem. Opp'n Pls.' Mot. J. Agency R. at 27-28.

[16] The court has considered whether pre-sale warehousing costs may fall under the COS provision. See, e.g., *Asahi Chem. Indus. v. United States*, 12 C.I.T. 690, 693-94, 692 F. Supp. 1376, 1379 (1988) (finding pre-sale warehousing charges incurred in home market may merit COS adjustment); *NTN Bearing Corp. v. United States*, 14 C.I.T. 623, 641, 747 F. Supp. 726, 741-42 (1990) (holding pre-sale warehousing costs may be directly related to sales under consideration and thus warrant COS adjustment). But see *LMI-La Metalli Industriale, S.p.A. v. United States*, 912 F.2d 455, 457-58 (Fed. Cir. 1990) (affirming ITA determination that pre-sale warehousing costs were not attributable solely to home market sales, and thus not directly related).

the COS provision if the expenses are determined to be directly related to the sales at issue. Therefore, the court remands this issue for Commerce to determine to what extent the pre-sale home market transportation costs at issue may be deducted as a COS adjustment in calculation of FMV.

B. VAT Adjustment

The Committee challenges whether Commerce's treatment of the Mexican VAT in this case was appropriate. The Committee argues that the court should remand the issue to Commerce to adjust USP by the VAT amount that would have been collected on the merchandise if the sales were home market sales. Commerce concedes that in *Federal-Mogul Corp. v. United States*, 834 F. Supp. 1391, 1396 (Ct. Int'l Trade 1993), the court rejected the manner in which Commerce had been interpreting *Zenith Elecs. Corp. v. United States*, 988 F.2d 1573, 1582 n.4 (Fed. Cir. 1993), when making a VAT adjustment. Commerce thus agrees that the court should remand this case for VAT adjustment, as does CEMEX. The court further instructs Commerce that it shall apply its new VAT methodology as approved in *Torrington Co. v. United States*, 853 F. Supp. 446, 448-49 (Ct. Int'l Trade 1994).

C. Applicability of Adverse BIA to Reclassified ESP Sales

CEMEX contests both Commerce's application of BIA for reclassified ESP sales and the specific rate chosen. CEMEX argues that the case should be remanded for Commerce to request from CEMEX indirect selling expense information on the reclassified ESP sales. Commerce maintains that because it did not have adequate information upon which to determine the appropriate adjustments on the ESP sales, it was justified in using BIA as the basis for the deductions required by 19 U.S.C.

§ 1677a(e) (1988). The Committee supports Commerce's view.

Congress has mandated that Commerce "shall, whenever a party or any other person refuses or is unable to produce information requested in a timely manner and in the form required, or otherwise significantly impedes an investigation, use the best information otherwise available." 19 U.S.C. § 1677e(c) (1988). Similarly, the regulations provide for the use of BIA when Commerce "(1) does not receive a complete, accurate and timely response to . . . [a] request for factual information; or (2) is unable to verify, within the time specified, the accuracy and completeness of the factual information submitted." 19 C.F.R. § 353.37(a) (1993). Commerce lacks subpoena power, but the BIA provision is a means of obtaining compliance with Commerce's requests for information. See *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1900).

Commerce's initial questionnaire in the administrative review requested that CEMEX report its United States sales and identify each as a PP sale or an ESP transaction. The questionnaire clearly indicated, consistent with the definitions provided in 19 U.S.C. § 1677a(b)-(c), the distinction between PP sales and ESP sales.[17] Upon learning that CEMEX had misclassified 11 ESP sales as PP transactions,[18] Commerce requested that CEMEX submit documentation to verify the entry dates of the questioned

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[17] The questionnaire defined PP sales as "sales to an unrelated buyer for export to the United States, with dates prior to the date on which the merchandise was imported into the United States." See App. Pls.' Reply Br. Supp. Mot. J. Agency R. and Br. Resp. Issues Raised Def.-Int. App. E, at C-1. The questionnaire defined ESP sales as "sales made to an unrelated buyer for the U.S. market after the date on which the merchandise was imported into the United States." *Id.* App. E, at C-2.

[18] See supra note 12.

sales.[19] Along with the verification information requested by Commerce, CEMEX proffered additional information that had not been requested. The additional information provided Commerce with data to calculate indirect selling expenses for the sales that CEMEX had misclassified. Commerce rejected the additional information and instead applied BIA in the calculation of USP for the reclassified ESP sales.

CEMEX claims that the use of BIA was improper in this case for three reasons: a/ Commerce had no basis to reclassify any of the reported PP sales; b/ Commerce was required to request or give CEMEX the opportunity to provide the necessary indirect selling expense information; and c/ Commerce should have used "neutral" information rather than adverse BIA.

This court cannot accept CEMEX's argument that Commerce had no basis to reclassify the reported PP sales. CEMEX contends that Commerce's reclassification of the 11 sales was improper because the date of sale of the reclassified sales preceded their date of entry. CEMEX points to an earlier ruling made by Commerce in the original investigation stating that Commerce "considered the date of shipment to be the date of sale." Gray Portland Cement and Clinker from Mexico, 55 Fed. Reg. 29,244, 29,248 (final determ. of LTFV sales). CEMEX argues that it relied upon this classification of the "date of sale" when preparing its response to Commerce's questionnaire. CEMEX, however, overlooked Commerce's explicit definitions of PP sales and ESP sales contained in the questionnaire. Moreover, CEMEX misinterprets Commerce's ruling in the original investigation, because Commerce limited its "date of sale" holding to a small

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[19] Commerce requested that CEMEX submit "any U.S. Customs documentation (e.g., Form 7501) which would indicate the date of entry" for each of the 14 sales at issue. See Conf. App. Def.-Int.'s Mem. Opp'n Pls.' Mot. J. Agency R. App. N (Commerce Apr. 15, 1993 letter to CEMEX).

class of United States sales, i.e., sales made pursuant to a long-term contract, and a subsequent "letter agreement." *Id.* There is no evidence in the record showing that the sales at issue fall within this narrow class of United States sales.

CEMEX's second argument, that Commerce was required to request or give CEMEX the opportunity to provide the necessary information, also fails. As indicated, CEMEX asserts that Commerce inappropriately resorted to BIA and that the case should be remanded directing Commerce to request indirect selling expense data from CEMEX. CEMEX insists that only a refusal to comply with an information request justifies a resort to BIA. The court finds CEMEX's reliance upon *Olympic Adhesives Inc. v. United States*, 899 F.2d 1565 (Fed. Cir. 1990), *Daewoo Elecs. Co. v. United States*, 13 C.I.T. 253, 712 F. Supp. 931 (1989), aff'd in part and rev'd in part, 6 F.3d 1511 (Fed. Cir. 1993), cert. denied, 114 S. Ct. 2672 (1994), and *Outokumpu Copper Rolled Prods. AB v. United States*, 829 F. Supp. 1371 (Ct. Int'l Trade 1993), is misplaced.

In Olympic Adhesives, Commerce had resorted to BIA because it claimed that respondent through its questionnaire response failed to provide information that "unequivocally negated or established the allegation that the home market sales were fictitious." 899 F.2d at 1574. There the court held that Commerce "may not properly conclude that resort to the best information rule is justified in circumstances where a questionnaire is sent and completely answered, just because the ITA concludes that the answers do not definitely resolve the overall issue presented." *Id.*

Further, in Daewoo, Commerce had not "followed the regular procedure of providing a questionnaire containing the appropriate instructions needed to compile the required information." 13 C.I.T. at 265, 712 F. Supp. at 944. Commerce chose not to use some of the calculations

incorrectly reported by the respondent. Id. Thus the Daewoo court concluded that Commerce had improperly resorted to BIA because the inaccurate responses were a result of "[Commerce's] own failure to provide instructions as to the methods of compiling the information." *Id.* at 266, 712 F. Supp. at 945.

Lastly, Commerce's questionnaire in Outokumpu provided: " 'Be aware that if we do not agree with your preference for comparison, at a later date we will have to request information on cost differences for items we select for comparison.' " 829 F. Supp. at 1375-76. The Outokumpu respondents provided in their questionnaire several model matches between merchandise sold in the United States and in the home market, and included difference-in-merchandise data for their reported comparisons only. *Id.* at 1376. Petitioners claimed that Commerce erred when it failed to use BIA for missing difference-in-merchandise data. Commerce, however, had never requested further information on the comparisons it selected. Id. The Outokumpu court thus found that Commerce's decision not to resort to BIA was appropriate. *Id.* at 1377.

In the present case, unlike the facts in Olympic Adhesives, Daewoo and Outokumpu, the data was not missing because Commerce had failed to make an appropriate request for it, but rather because CEMEX misclassified the data in its submission. Thus, Commerce acted reasonably in resorting to BIA for the missing data. Further, CEMEX submission of the correct indirect selling expense data to Commerce was untimely—after verification and two weeks before the final results were issued—thus preventing Commerce from verifying the information. Pursuant to 19 C.F.R. § 353.37(a), Commerce was justified in rejecting the data submitted untimely and in resorting to BIA. See, e.g., *Mantex, Inc. v. United States*, 841 F. Supp. 1290, 1309-10 (Ct. Int'l Trade 1993); *Chinsung Indus. Co. v. United States*, 13 C.I.T. 103, 105-07, 705 F. Supp. 598, 600-02 (1989).

The final argument to be addressed is whether Commerce should have used "neutral" information because Commerce classified CEMEX as "essentially . . . a cooperative respondent." 58 Fed. Reg. at 25,808. CEMEX maintains that if the court determines Commerce's use of BIA was proper, Commerce shtould have used "neutral" information.[20] Commerce used as BIA the weighted-average of all of the ESP adjustments for the ESP sales properly reported by CEMEX.

CEMEX misunderstands Commerce's BIA methodology as well as the general purpose of the BIA provision. Commerce applies either "partial BIA" or "total BIA."[21] Regardless of the type of BIA used, Commerce does not apply a "neutral" figure as BIA except in very unusual situations for which a respondent should not be penalized.[22]

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[20] CEMEX claims that Commerce should have used the weighted average of the indirect selling expenses reported by CEMEX as BIA. See Def.-Int.'s Mem. Opp'n Pls.' Mot. J. Agency R. at 38.

[21] Under Commerce's BIA methodology, there are two general types of BIA: "total BIA" and "partial BIA." For "total BIA" the respondent's entire dumping margin is calculated upon the basis of BIA. Commerce uses "total BIA" for a respondent whose reporting or verification failure is so extensive as to make its entire response unreliable. Commerce's choice of a particular BIA rate is dependent upon whether the respondent is deemed to have been "co-operative" or "uncooperative." Commerce will use the highest possible BIA rate for an "uncooperative" respondent.

Commerce applies "partial BIA" when a respondent's submitted information is deficient in limited respects, yet is still reliable in most other respects. In a "partial BIA" situation, Commerce alleges it does not consider the level of cooperation of the respondent.

[22] In a "partial BIA" situation the only instance in which BIA is not adverse is when there is an inadvertent gap in the record, e.g., Replacement Parts for Self-Propelled Bituminous Paving Equipment from Canada, 58 Fed. Reg. 15,481, 15,482-83 (Dep't Comm. 1993) (final), when only a minor or insignificant adjustment is involved, e.g., Brass Sheet and Strip from West Germany, 55 Fed. Reg. 28,264, 28,265 (Dep't Comm. 1990) (preliminary results), or when the missing data is beyond the control of the respondent. See, e.g., *Holmes Prods. Corp. v. United States*, 16 C.I.T. 628, 629-

The purpose of the BIA provision is to induce respondents to provide Commerce with timely, complete and accurate information so that Commerce can determine dumping margins as accurately as possible. *Rhone Poulenc*, 899 F.2d at 1190-91. To accept CEMEX's contention that "neutral" information should have been applied in this case where CEMEX misclassified its sales would undermine the purpose of the BIA provision, and would allow a respondent to pick and choose among its data, a practice not permitted.

Although Commerce's application of adverse BIA in this case was appropriate, Commerce requests that the court remand the case for correction of selection of adverse BIA. Commerce asserts that the use as BIA of the weighted-average of all the ESP adjustments to ESP sales properly reported by CEMEX resulted in Commerce, (a) not using actual expense data timely reported by CEMEX for certain ESP adjustments for these ESP sales, and (b) including certain adjustments that could not have been applicable to these ESP sales. See Def.'s Mem. Opp'n Def.-Int.'s Mot. J. Agency R. at 19. CEMEX argues that Commerce: a/ disregarded verified price adjustment information pertaining to the reclassified sales, and b/ included unrelated expenses in BIA applied to the reclassified sales. See Def.-Int.'s Mem. Supp. Points Raised Def.-Int.'s Compl. at 41, 43. As the request made by Commerce to correct its selection of BIA is consistent with CEMEX's claim, the court remands this issue for Commerce to reconsider what corrections are appropriate.

D. Application of Adverse BIA for Added Materials Costs

CEMEX reasserts the argument that because Commerce labeled CEMEX a "cooperative" respondent, Commerce

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31, 795 F. Supp. 1205, 1206-07 (1992) (requiring ITA to use respondent's data because respondent was found by ITA to be in substantial compliance and could not control conduct of uncooperative affiliate).

should have used "neutral" information instead of adverse BIA for added materials costs. CEMEX further contends that if adverse BIA was to be used, Commerce should have used as BIA the highest individually reported added materials costs per cubic yard of concrete, while applying the specific conversion factor[23] reported by CEMEX on a product-by-product basis, to arrive at the added materials costs per cement ton. Specifically, CEMEX argues that Commerce should be required to use CEMEX's data that was later verified, and should limit its use of BIA to the one component of the added materials costs that CEMEX did not report.[24] CEMEX maintains that this measure "would reasonably reflect the actual costs of added materials." Def.-Int.'s Mem. Supp. Points Raised Def.-Int.'s Compl. at 47. Commerce argues that it was within its discretion in selecting "partial BIA" to apply the highest information reported by CEMEX for other products in place of the information not reported.

In calculating the value-added adjustment to ESP for CEMEX's further manufactured sales through Sunward Materials, Commerce did not accept any of the average added materials costs CEMEX supplied. Commerce instead used BIA for the necessary added materials cost adjustments. For the Phoenix division, BIA was based

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[23] All concrete costs and sales are recorded in CEMEX's accounting records in terms of dollars per cubic yard of concrete. All cement sales by CEMEX and the adjustments and factors in CEMEX's computer tape are reported in terms of dollars per ton of cement. CEMEX's questionnaire response to Commerce included a column in the computer tape, "BLKCONVE," that provided the conversion factor necessary to convert information reported on the basis of dollars per cubic yard of concrete to a dollars per ton of cement basis, for each product.

[24] For approximately 18% of CEMEX's further manufactured concrete products manufactured by its U.S. subsidiary, Sunward Materials, Inc. (through its Phoenix and Tucson divisions), all elements except direct materials were fully costed. For these products, CEMEX reported an average added materials cost and a specific conversion factor.

upon the highest individually calculated added materials cost per cement ton, for any product made at the division for which CEMEX had properly reported product-specific costs. For the Tucson Division, Commerce followed the same approach. 58 Fed. Reg. at 25,809.

As previously discussed, in the "partial BIA" context, "neutral" BIA is applied only to a respondent who has substantially complied and there is also an inadvertent or unavoidable gap in the record, or when a minor or insignificant adjustment is involved. See supra note 22. In the present case, CEMEX failed to provide actual added materials cost data and the adjustments at issue were significant.

CEMEX asserts that, at least, Commerce should have used the highest available data on costs per yard of concrete, multiplied by the product-specific conversion factor supplied. Commerce instead filled in missing added materials cost data in "per cement ton" terms by taking CEMEX's highest end result for added materials costs, yielding a higher BIA rate than would result from the approach advocated by CEMEX. Commerce has previously applied this method to other products. See, e.g., Pressure Sensitive Plastic Tape from Italy, 54 Fed. Reg. 13,091, 13,092 (Dep't Comm. 1989) (final).

CEMEX asserts, however, that here this results in a margin of over 1000% for the products involved because of the wide variation in the amount of cement used in particular products. While Commerce may use "adverse" BIA here, the result of Commerce's selection may be needlessly distortive. Accordingly, this matter will be remanded to determine if the method recommended by CEMEX would result in a sufficiently adverse, but non-distortive, BIA choice.[25]

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[25] CEMEX suggests that verified total material cost information proves that the BIA chosen was unduly distorted. On remand, ITA may wish to refer to such data as a check on its selection.

Conclusion

Commerce's methodology for determining FMV in this case is not in accordance with law. Thus, the court remands the case for Commerce to consider CEMEX's claimed deductions for its pre-sale home market transportation costs under the COS provision. Also, Commerce's methodology for determining the VAT adjustment in this case is not in accordance with law. Accordingly, the court remands the case directing Commerce to apply its new VAT adjustment methodology. Commerce's decision to use adverse BIA for the reclassified sales and added materials costs is supported by substantial evidence in the record and is otherwise in accordance with law, but Commerce shall reconsider its selection of particular BIA data for both the reclassified sales and added materials costs.

Remand results are due within forty-five days. Objections are due twenty days thereafter. Responses may be filed twelve days later.

Jane A. Restani, JUDGE

Dated: New York, New York, This 26th day of September, 1994.

APPENDIX F

**[Final Agency Determination—
Published April 28, 1993]**

GRAY PORTLAND CEMENT AND CLINKER FROM MEXICO; FINAL RESULTS OF ANTIDUMPING DUTY ADMINISTRATIVE REVIEW

Agency: International Trade Administration/Import Administration, Department of Commerce.

Action: Notice of final results of antidumping duty administrative review.

Summary: On January 26, 1993, the Department of Commerce published the preliminary results of its administrative review of the antidumping duty order on gray portland cement and clinker from Mexico. The review covers two manufacturers/exporters of the subject merchandise to the United States and the review period April 12, 1990, through August 31, 1991.

We gave interested parties an opportunity to comment on our preliminary results. Based on our analysis of the comments received and the correction of certain clerical errors, we have revised the preliminary rates. The final dumping margins range from 30.44 percent to 53.26 percent.

Effective Date: April 28, 1993.

For Further Information Contact: Marina McClelland, Office of Antidumping Compliance, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone (202) 482-4852.

Supplementary Information:

Background

On January 26, 1993, the Department of Commerce (the Department) published in the Federal Register (58 FR 6113) the preliminary results of its administrative review of the antidumping duty order on gray portland cement and clinker from Mexico (August 19, 1990, 58 FR 6113). The Department has now completed that review in accordance with section 751 of the Tariff Act of 1930, as amended (the Act).

Scope of Review

The products covered by this review are gray portland cement and clinker. Gray portland cement is a hydraulic cement and the primary component of concrete. Clinker, an intermediate material product produced when manufacturing cement, has no use other than of being ground into finished cement.

Gray portland cement is currently classifiable under the Harmonized Tariff Schedule (HTS) item number 2523.29, and cement clinker is currently classifiable under number 2523.10. Gray portland cement has also been entered under number 2523.90 as "other hydraulic cements." The HTS subheadings are provided for convenience and U.S. Customs Service purposes only. The written description remains dispositive as to the scope of the product coverage.

The review covers two manufacturers/exporters of the subject merchandise to the United States and the period April 12, 1990 through August 31, 1991. One manufacturer/exporter, Apasco, S.A. de C.V. (Apasco), made no shipments during the period of review (POR). As a result, the Department has retained as the cash deposit for Apasco the margin percentage calculated for Apasco in the final determination of sales at less than fair value.

Analysis of Comments Received

We invited interested parties to comment on the preliminary results. We received written comments from the Ad Hoc Committee of AZ-NM-TX-FL Producers of Gray Portland Cement and the National Cement Company of California (the petitioners), and one respondent, CEMEX, S.A. (CEMEX). On March 19, 1993, we held a public hearing.

Comment 1: Relying on section 773(a)(5) of the Act of 1930, as amended, petitioners allege that through different movements in the prices of Types I and II cement in the home market, CEMEX created a fictitious market in order to reduce or eliminate the dumping margin on Type II cement. Petitioners state that the foreign market value (FMV) of Type II cement decreased while the FMV of Type I increased slightly after the issuance of the antidumping duty order on Mexican cement. Petitioners add that although Type I and Type II cement are interchangeable for most purposes, the relative quantities of Type I and Type II cement sold changed little during the period of the pricing movements.

In making this allegation, petitioners insist that the price movements relevant to a fictitious market are the movements of net, ex-factory price of FMV, rather than movements in gross price or delivered price. Moreover, petitioners argue that the statute does not require that the sales evidencing a fictitious market be non-bona fide sales.

Petitioners explain that because CEMEX sells primarily Type I cement and relatively little Type II cement in the home market, the lowering of FMV of Type II cement does not measurably affect home market revenue, while it does decrease CEMEX's financial burden of exporting goods which are assessed a large antidumping duty. Consequently, petitioners argue, the Department should reject CEMEX's home market sales of Type II cement as the basis for FMV and should instead use home market sales of Type I cement to calculate FMV. Petitioners add that

under the statute, CEMEX's "plausible business reasons" are no defense against an allegation of a fictitious market.

CEMEX asserts that petitioners erroneously base their fictitious market allegation on net prices (*i.e.*, FMV). CEMEX argues that the petitioners must prove their claim of fictitious market by showing the existence of non-bona fide Type II cement sales in the home market. CEMEX also insists that the statute requires the Department to examine only the price paid by the customer, minus discounts and rebates. CEMEX states that these principles are clearly stated in the statute and its legislative history and are reflected in the Department's approach to previous fictitious market allegations.

CEMEX argues that there is no evidence in the record of any non-bona fide sales. In addition, CEMEX maintains that any conceivable anomaly in price movements vanishes when the price paid by the customer is examined.

CEMEX further argues that petitioners have not made any realistic challenge to CEMEX's claim that its pricing behavior resulted from good faith decision-making both before and after the antidumping duty order was issued. According to CEMEX, following the relocation of production of Type II cement to northern Mexico and an increase in rail freight rates, CEMEX made a business decision to assume responsibility for, rather than pass on, much of the resulting additional freight costs in order to retain its Type II cement customers. In addition, CEMEX decided to lower its prices of Type II cement near Chihauhua, Mexico, due to new U.S. cement competition resulting from the Mexican Government's elimination of duties on cement imported into Mexico from the United States. Therefore, CEMEX claims that any theoretical anomaly in Type II cement FMV resulted from CEMEX's legitimate business decisions to retain Type II cement customers in Mexico.

Department's Position: We disagree with petitioners' contention that the Department should disregard Type II

cement sales as the basis for FMV under section 773 (a)(5) of the Tariff Act. In our preliminary results of review, we found that the evidence in the record was not sufficient to establish that CEMEX had created a fictitious market (see Gray Portland Cement and Clinker from Mexico; Preliminary Results of Antidumping Duty Administrative Review, 58 FR 6113 (January 26, 1993)). After reviewing the case and rebuttal briefs, the Department continues to hold that the evidence does not warrant the finding of a fictitious market.

In reaching this conclusion, the Department does not accept CEMEX's argument that petitioners must show non-bona fide Type II cement sales. Prior to 1988, section 773(a)(1) of the Act was the only provision in the statute addressing fictitious markets. Under that provision, the analysis the Department was to undertake arguably focused only on the existence of non-bona fide sales, as the required examination addressed only the existence of pretended sales or offers for sale, or sales or offers for sale intended to establish a fictitious market. See *Monsanto v. United States*, 698 F. Supp. 275, 279 (CIT 1968); H.R. Conf. Rep. No. 79, 67th Cong., 1st Sess. at 11 (1921). However, with the addition of section 733(a)(5) to the statute in 1988, language was added to the statute expressly allowing for examination of the price movements of different forms of the subject merchandise when assessing the existence of a fictitious market. As a result, the Department clearly need not require the existence of non-bona fide sales in establishing the existence of a fictitious market. Rather, accepting all sales as legitimate, the Department can look at the price movements of the multiple forms of the subject merchandise and, depending on the nature of those price movements, find that a respondent has established a fictitious market (see Tubeless Steel Disc Wheels from Brazil; Final Results of Antidumping Duty Administrative Review, 56 FR 14083, 14085 (April 5, 1991) (Steel Wheels from Brazil); Cyanuric Acid and its Chlorinated Derivatives

from Japan; Final Results of Antidumping Duty Administrative Review, 55 FR 1690, 1691 (January 18, 1990) (Cyanuric Acid from Japan); S. Rep. No. 71, 100th Cong., 1st Sess. at 126 (1987)).

In fact, section 773(a)(5) of the Act states that in determining the existence of a fictitious market, the Department may consider evidence of movement in the prices at which different forms of the subject merchandise are sold after the issuance of an antidumping duty order. The Department examines the prices paid by the customers and determines what effect the movements of those prices have on the FMV of the subject merchandise. If the price movements appear to reduce the amount by which the FMV of the merchandise exceeds the United States price (USP) of the merchandise, the Department may consider the price movements to be evidence of a fictitious market. As the legislative history of section 773(a)(5) explains:

> It has come to the Committee's attention that fictitious markets may be created relatively easily when merchandise is produced and sold in multiple forms. If a foreign manufacturer or producer exports only one of such forms to the United States and has been found to be dumping that form, he may artificially set his home market prices of the different forms to reduce the amount by which the foreign market value of the identical merchandise exceeds the U.S. price of such merchandise. If only sales of the identical merchandise are used in determining the foreign market value, the net effect of such artificial pricing may be to eliminate any finding of dumping even though the average home market price of the different forms of the merchandise may still exceed the U.S. price of the imported merchandise.
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> For example, a chemical product may be produced and sold in powder and granular forms, both of which have similar uses and production costs. If a

> foreign manufacturer who produces and sells both products in his home market is found to be dumping the powder product in the United States, the only form that the manufacturer exports, he can minimize any antidumping duties finally assessed, and avoid a finding of sales at less than fair value during any review under section 751, by lowering his home market price for the powder product while maintaining or raising his home market price for the granular product.

See S. Rep. No. 71, 100th Cong., 1st Sess. at 126 (1987). See also Steel Wheels from Brazil and Cyanuric Acid from Japan.

However, contrary to petitioners' assertions, the existence of a fictitious market is not necessarily established merely on the basis of price movements without regard to the reasons that may have caused those price movements. The presence of commercial factors other than the existence of an antidumping duty order is relevant in determining whether a fictitious market exists. Thus, we have found it appropriate to consider the business justifications offered by the respondent in determining whether a fictitious homemarket exists. In Cyanuric Acid from Japan, the Department considered the respondent's "plausible reasons" for the price movements at issue and rejected the petitioner's fictitious market allegation.

In this case, the POR is April 12, 1990 through August 31, 1991. The Department published the antidumping duty order on August 19, 1990. After issuance of the order, and until the end of the POR, the price to the customer of CEMEX's Type I and Type II cement followed similar patterns, increasing only with the rate of inflation. However, while the FMV of Type I cement meanwhile remained steady, increasing only with the rate of inflation, the FMV of Type II cement described twice after issuance of the order. The net effect of the decrease in the FMV for Type II cement was a reduction in the amount

by which the FMV of the merchandise exceeded the USP of this merchandise.

The discrease of the FMV of Type II cement resulted in large part from a business decision made by CEMEX not to pass on to its Type II customers certain transportation expenses that CEMEX incurred upon consolidating its Type II production. The changes in the FMV of Type II cement coincided generally with the relocation of CEMEX's production of Type II cement to a single plant in northern Mexico and a general increase in rail cargo rates. Before the issuance of the antidumping duty order, CEMEX planned to consolidate its production of Type II cement to a plant in northern Mexico. This plant is not only more efficient, but it also better facilitates sales to the United States, CEMEX's largest Type II cement market. In the spring of 1990, CEMEX began to move production of Type II cement to its northern Mexico plant. The freight charges associated with sales to most Type II customers in Mexico rose because the physical distances between plant and customer increased. In addition, in October of 1990, there was a fifteen percent increase in rail cargo rates which increased further the freight expenses for Type II cement sales.

The price of Type I cement was less affected by the general rail freight increase because CEMEX continued to produce Type I cement in all regions of the country. With many production sites, CEMEX does not depend as heavily on rail transportation of its Type I cement sales as it does for its Type II cement sales. As a result, the FMV of Type I cement was not significantly affected by the general increase in rail freight rates.

Rather than risk losing its Type II customers, CEMEX decided to assume responsibility for much of the increased freight costs resulting from the relocation of Type II cement to northern Mexico and the increase in rail rates. CEMEX therefore increased only slightly the price paid by its Type II cement customers.

In addition, the FMV of Type II cement decreased as a result of CEMEX's efforts to meet the added competition in Chihuahua from U.S. exporters of Type II cement. This increase in U.S. competition resulted from the Mexican government elimination of duties on cement imported into Mexico from producers on the U.S. side of the frontier zone.

Given these facts, and in the absence of information to rebut them, the Department accepts the business reasons offered by CEMEX in this case as an explanation of the different movements of prices, unrelated to establishing a fictitious market. We do not find that CEMEX's pricing of Type I and II cement has resulted in a fictitious market.

Comment 2: Addressing the Department's cost of production (COP) calculation, petitioners contend that only the interest income specifically recorded in CEMEX's short-term interest income account should be allowed as an offset to CEMEX's interest expense; other financial income should not be allowed as an offset since it cannot be tied to short-term investments.

CEMEX contends that because of the fungibility of interest income, such income should be treated symmetrically (i.e., netted) with interest expense. Accordingly, the Department should not disregard any financial income. If, however, the Department decides to disregard CEMEX's long-term interest income, CEMEX argues that the Department should continue to disregard the monetary losses associated with that income.

Department's Position: We agree with petitioners. The Department has a well-established practice of disallowing long-term interest income offsets to interest expense because such activities are generally considered by the Department to be income-producing activities unrelated to the product under review (See Department's Position to Comment 9, Television Receivers, Monochrome and Color, from Japan; Final Results of Antidumping Duty Administrative Review, 56 FR 56189, 56192 (November

1, 1991)); see also Final Determination of Sales at Less Than Fair Value; Steel Wire Rope from Korea, 58 FR 11029, 11035 (February 23, 1993)). However, the Department typically allows short-term interest income offsets to interest expense if that income can be attributed to the producti on of the product under review. Because CEMEX's sub-account 6421 was the only portion of interest income that we verified to be short-term, we disallowed all of CEMEX's other interest income. Given that the disallowance of long-term interest income affected the monetary correction adjustment to CEMEX's corporate financial expense, we made a corresponding adjustment to CEMEX's reported monetary correction (see our response to Comment 4 for explanation of monetary correction).

Comment 3: Petitioners contend that in calculating the cost of production, it is the Department's established practice to adjust corporate financial expense only for foreign exchange gains and losses specifically related to the cost of manufacturing the subject merchandise. Petitioners argue that because foreign exchange gains realized by certain CEMEX subsidiaries are not related to the manufacture of the subject merchandise, such gains should not be permitted to offset CEMEX's foreign exchange losses.

CEMEX contends that the Department correctly offset CEMEX's interest expense with all of CEMEX's foreign exchange gains.

Department's Position: We agree with petitioners and have made the appropriate changes in our final results. The Department has long upheld the position that foreign exchange gains and losses not specifically incurred as a cost of producing the subject merchandise should not be allowed as an offset to cost of manufacture (see Certain Stainless Steel Cooking Ware from the Republic of Korea, 58 FR 9560, 9561 (February 22, 1993)); see also Final Results of Antidumping Duty Administrative Review; Color Television Receivers, Except for Video Monitors,

from Taiwan, 56 FR 31378, 31385 (July 10, 1991) and Final Determination of Sales at Less Than Fair Value; Certain Small Business Telephone Systems and Subassemblies Thereof from Korea, 54 FR 53141, 53149 (December 27, 1989)).

CEMEX's foreign exchange gains and losses largely resulted from foreign held monetary assets and liabilities. Although many of these assets and liabilities were held by CEMEX to finance the company's general cement-producing operations, the gains and losses were not attributable to production inputs of products under review and, as such, have been disallowed in our final results. Given that the disallowance of foreign exchange gains and losses affected the monetary correction adjustment to CEMEX's corporate financial expense, we made a corresponding adjustment to CEMEX's reported monetary correction (see Comment 4 below for explanation of monetary correction.)

Comment 4: Citing Steel Wheels from Brazil, 52 FR 8947 (March 20, 1989), Paint Filters and Strainers from Brazil, 52 FR 19181, 19183 (May 21, 1987), and Frozen Concentrated Orange Juice from Brazil, 52 FR 8324, 8329 (March 17, 1987), petitioners contend that a monetary correction adjustment due to inflation should not be made to CEMEX's reported corporate financial expense because such an adjustment is contrary to Department precedent, would distort CEMEX's actual cost of production during the period of review, and largely results from related party transactions.

Petitioners also argue that an adjustment for monetary correction should be rejected because such an adjustment violates both Mexican and United States generally accepted accounting principles (GAAP). For example, petitioners contend that an adjustment for monetary correction violates the "matching principle" in which costs incurred during a particular period are matched with their associated revenues. Although petitioners concede that

Bulletin B-10 of Mexican GAAP requires Mexican companies to report the effects of inflation on their monetary assets and liabilities, petitioners contend that Bulletin B-10's monetary correction provision should not be applied in this review since its purpose is to facilitate year-to-year comparisons of financial statements, not to calculate production costs. Likewise, petitioners contend that Financial Accounting Standards Board Statement of Financial Accounting Standard 89 (FASB-89), promulgated under U.S. GAAP, excludes purchasing power gains and losses from income from continuing operations.

Alternatively, petitioners argue that if the Department departs from its past practice and allows an adjustment for monetary correction to interest expense, only the portion of monetary position gain attributable to the cost of producing the subject merchandise should be allowed to offset interest expense.

CEMEX contends that the Department correctly included monetary gains and losses in the calculation of net financing expenses. CEMEX contends that the Department's adjustment for monetary position gains and losses due to inflation (*i.e.*, monetary correction) is consistent with Departmental policy and accurately reflects CEMEX's actual cost of financing in a non-distortive manner. CEMEX also contends that CEMEX's adjustment for monetary correction is consistent with the cost/revenue matching principle and is not a result of related-party transactions.

Department's Position: We disagree with petitioners and agree with respondent. The Department has a well-established practice of recognizing the effects of inflation on companies' reported costs. In Brazil, for example, a country the Department considers to be hyperinflationary, Brazilian GAAP recognizes the effects of inflation by requiring companies to index their debt principal. We also reflect the effects of inflation by calculating monthly costs

of production. Our use of monthly current costs, however renders further monetary correction unnecessary.

This is not the case with Mexico. Because we do not consider Mexico to have been hyperinflationary during the period of review, we have not used monthly current costs of production in our final results. Nonetheless, Mexico did experience significant inflation during the period of review. Given that monetary correction under Mexican GAAP pertains solely to the holding of monetary assets and liabilities, not accounting for the effects of inflation, which are recognized by CEMEX's adjustment for monetary correction, would distort CEMEX's corporate financial expense and income.

Petitioners have cited the first administrative review of Porcelain-on-Steel Cookware from Mexico (Cookware), 55 FR 39186 (September 25, 1990), as precedent for disallowing adjustments for monetary correction. While the Department denied the respondent an adjustment for monetary correction in the first administrative review of Cookware, the Department accepted the adjustment in the second and third reviews. An adjustment for monetary correction was also a factor in our decision to initiate the sales-below-cost investigation of CEMEX in this review.

Citing New Minivans from Japan; Final Determination of Sales at Less Than Fair Value, 57 FR21937 (May 26, 1992), petitioners contend that the Department does not always rely on the respondent country's GAAP when calculating cost of production. Although we agree with petitioners that the Department sometimes deviates from another country's GAAP, such deviations are usually made when adherence to that country's GAAP materially distorts a respondent's actual production costs. Given the significant inflation experienced by Mexico during the period of review, we believe that deviating from Mexican GAAP by not allowing for the monetary correction would lead to distortion in CEMEX's costs of production.

We disagree with petitioners' contention that an adjustment for monetary correction violates the "matching" of CEMEX's costs and revenues. Contrary to petitioners' assertion, the monetary correction is not simply a year-end adjustment to CEMEX's corporate financial expense. Rather, it is the sum of all corrections to financial expenses made throughout the year. Accordingly, it is an integral compound of CEMEX's corporate financial expense which, if not reflected in CEMEX's corporate financial expense, would lead to distortions in CEMEX's reported cost of production.

We also disagree with petitioners' alternative assertion that monetary position gains should be limited to the portion that can be specifically tied to the cost of producing the subject merchandise. The Department has long upheld the position that financing expenses are fungible. Accordingly, consistent with past Departmental practice, we do not distinguish whether interest expense is related or unrelated to the merchandise under review (see Final Determination of Sales at Less Than Fair Value; Steel Wire Rope from Korea, 58 FR 11035 (February 23, 1993)). Therefore, we have adjusted CEMEX's interest expense for monetary correction and allocated the adjustment amount over the cost of goods sold for all products.

Petitioners' assertion that CEMEX's monetary gains result largely from related party transactions is incorrect. The financial statement footnotes to which petitioners refer apply to CEMEX's unconsolidated corporate financial statements. In accordance with Department practice, we used CEMEX's consolidated corporate financial statements in determining corporate financial expense. As stated in the footnotes to CEMEX's consolidated financial statements, all intercompany related party transactions have been eliminated.

Comment 5: CEMEX argues that the Department incorrectly adjusted the home market price for sales that

CEMEX termed "anticipated" sales by adding an imputed credit revenue. These sales included a minimal number of home market sales for which CEMEX was paid in advance of shipment. CEMEX argues that the Department has held a practice of not recognizing "opportunity benefits" in USP and FMV calculations and should, therefore, reject this additional imputed credit revenue. CEMEX cites Carbon Steel Wire Rod from Brazil; Final Determination of Sales at Less than Fair Value, 48 FR 43202, 43204 (September 22, 1983), and Certain Steel Pipes and Tubes from Japan; Preliminary Determination of Sales at Less than Fair Value, 47 FR 37263, 37265 (August 25, 1982).

Petitioners claim that CEMEX financially benefitted, at the annual rate of short-term investments, from these advance payments. Therefore, petitioners argue, the Department correctly determined the number of days between receipt of payment and shipment of the cement, and then multiplied this number by CEMEX's reported home market interest rate, in order to derive an imputed credit revenue.

Department's Position: We disagree with the respondent. The Department's current practice is to recognize "opportunity benefits" in FMV calculations (see, *e.g.*, Fuel Ethanol from Brazil; Final Results of Sales at Less than Fair Value, 51 FR 5,572, 5,576 (February 14, 1986)). In Large Power Transformers from Italy; Final Results of Antidumping Duty Administrative Review, 52 FR 46806 (December 10, 1987), for example, the Department determined that if a respondent manufacturer receives payment before shipping the merchandise, the credit calculation should reflect a credit income because the respondent had use of the money prior to shipment. Similarly, in this case, CEMEX had use of the pre-paid money prior to shipment. Therefore, the Department determines that it correctly adjusted FMV for credit revenue on pre-paid sales.

Comment 6: Petitioners argue that the Department should not deduct CEMEX's pre-sale freight expenses

from its plant to its terminals in calculating FMV. Petitioners disagree with the Department's policy of deducting pre-sale freight costs from FMV. Petitioners explain that while the statute requires the Department to deduct pre-sale freight expenses from USP in both purchase price (PP) and exporter's sales price (ESP) sales, the statute contains no similar provision authorizing such deductions in the calculation of FMV.

CEMEX argues that the Department correctly followed its policy of deducting pre-sale freight expenses. CEMEX points out that this policy recently was approved by the Court of International Trade (CIT) in *Ad Hoc Committee of AZ-NM-TX-FL Producers of Gray Portland Cement v. United States,* 787 F. Supp. 208, 213 (CIT 1992), which concerned the Department's final determination in the investigation of this case.

Department's Position: We disagree with petitioners. Since the final determination in the investigation in this case, we have followed a policy of deducting home market pre-sale freight expenses when calculating FMV for PP sales or ESP sales. This ensures an apples-to-apples comparison. See Gray Portland Cement and Clinker from Mexico; Final Determination of Sales at Less than Fair Value, 55 FR 29244 (July 18, 1990), Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Certain Components Thereof, from Japan; Final Results of Antidumping Duty Administrative Review, 56 FR 26054 (June 6, 1991); Red Raspberries from Canada; Final Results and Termination in Part of Antidumping Duty Administrative Reviews, 56 FR 677 (January 8, 1991). Further, as CEMEX notes, in the appeal of the final determination of the investigation in this case, the CIT approved the Department's policy of deducting pre-sale freight expenses when calculating FMV for PP sales.

Comment 7: Petitioners contend that it was appropriate for the Department to calculate cost of production on

a monthly basis. However, because of aberrations in CEMEX's December 1990 costs of manufacture for Type II cement, best information available should be used for that month's costs.

CEMEX contends that, as verified by the Department, its December 1990 costs of manufacture for Type II cements are accurate. However, CEMEX contends that the Department should calculate CEMEX's cost of production on an annual basis rather than a monthly basis.

Department's Position: We agree with respondent. During our verification of CEMEX, we determined that the "aberrations" referred to by petitioners were the result of normal year-end adjustments recorded in CEMEX's December accounting records. Our use of monthly costs of production in our preliminary results caused the December 1990 costs for some of CEMEX's facilities to appear aberrational. We have calculated and used annual 1990 and 1991 cost of production figures in our final results.

Comment 9: Petitioners argue that the Department should apply the "arm's length test" described in Certain Cold-Rolled Carbon Steel Flat-Rolled Products from Argentina; Preliminary Determination of Sales at Less Than Fair Value (Steel Flat-Rolled Products from Argentina), 58 FR 7066, 7069 (Appendix II, Section A) (February 4, 1993), in determining whether to accept related party sales for purposes of calculating FMV. According to petitioners, when that test is applied in this case, some sales made by CEMEX to related parties must be disregarded. Petitioners apply the test by disregarding sales where the weighted-average net price for an individual related party for a particular month is not equal to or greater than all unrelated customer weighted-average net prices for that month.

CEMEX disagrees with the petitioners' proposed treatment of related party transactions in the calculation of FMV. CEMEX argues that petitioners' comparison of a

specific net prices of sales to a related party to an average net prices of sales to all unrelated parties from all terminals is not a valid comparison. Further, CEMEX argues that there is no legal basis for selective exclusion of related-party transactions when the sales to a particular related party are excluded in one month and then included in the next month. CEMEX asserts that the established practice by the Department is either to find all sales to a particular related party to be unreliable and exclude them all from FMV calculations, or to accept the arms-length nature of the sales to that party and include them all in the calculations. CEMEX argues finally that if petitioners had compared net prices on a terminal-specific basis and had not analyzed the sales on a monthly basis, petitioners would have discovered that net prices of sales to related customers are, on the whole, equal to or greater than the unrelated customer net prices.

Department's Position: We disagree with petitioners. The Department is currently accepting comments from interested parties on the application of the "arm's length" test described in the preliminary determination of Steel Flat-Rolled Products from Argentina. Due to the preliminary nature of the "arm's length" test used in Steel Flat-Rolled Products from Argentina, the Department used a test based on our past practice. See Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts thereof from France; Final Results of Antidumping Duty Administrative Reviews, 57 FR 28393 (June 24, 1992). Upon examination, we used sales to related customers only where we determined such sales were made at arm's length, *i.e.*, at prices comparable to prices at which the firm sold identical merchandise to unrelated customers.

Comment 10: Petitioners argue that best information available (BIA) should be used to account for invoice No. CA-1528 because CEMEX incorrectly instructed the Department prior to verification to delete this invoice from the U.S. sales data base. Petitioners contend that this sale

should have been included in the U.S. sales data base because the record shows that it is an ESP sale and that this sale occurred during the POR.

CEMEX argues that BIA should not be used because CEMEX reported all requested data and merely pointed out to the Department that the sale at issue should not legally be included in the antidumping calculation. CEMEX further explains that liquidation of the entry for this sale had not been suspended by the U.S. Customs Service. CEMEX states that the statute makes it clear that entries whose liquidation had not been suspended are not subject to an administrative review.

Department's Position: The Department has examined the information pertaining to the entry which was prematurely liquidated. Although the entry was liquidated, we have decided that inclusion of the sale in our analysis is appropriate in order to determine the estimated antidumping duty (cash deposit) for CEMEX Therefore, we have included this transaction in our calculations, using the information CEMEX provided to determine the appropriate classification and adjustments.

Comment 11: Petitioners assert that certain sales reported as purchase price sales should be treated as ESP sales, because there is no evidence that these sales were made prior to the date of importation. According to the statute, a purchase price sale is identified as a sale that occurs prior to importation. An ESP sale may occur either before or after importation into the United States depending on certain factors. Petitioners claim that because the cement was shipped from Mexico well in advance of the reported dates of sale and CEMEX did not report the date of importation, importation likely occurred prior to the reported dates of sale and the sales, therefore, must be considered ESP sales.

CEMEX argues that the sales were correctly classified as PP sales, and that petitioners' argument is evidentiary

in nature. According to CEMEX, petitioners can, at most, establish that the sales were made after exportation, but that the sales were made after importation. Without that ESP. CEMEX asserts that petitioners would have to show that the sales were made after importation. Without that evidence, CEMEX insists that the Department should accept CEMEX's representation, through CEMEX's classification of these sales as PP sales, that these sales were made prior to importation. CEMEX adds that petitioners' argument is based on an assumption rather than factual evidence.

Department's Position: We agree in part with petitioners. In order for the Department to determine the classification of the sales in question, the Department requested that CEMEX provide the entry documents for those sales. CEMEX provided the requested information. Upon evaluation of this and other information in the record, the Department determines that some of the sales recorded as PP sales are ESP sales because the date of importation occurred before the date of sale. Consequently, for those sales misclassified as PP sales, the Department has treated them as ESP sales. Further, because the Department does not have adequate information on which to determine the correct adjustments for these ESP sales, we have used BIA as the basis for the deductions. Treating CEMEX essentially as a cooperative respondent, the Department used a weighted-average of the ESP expenses reported in the original ESP response as BIA for these ESP sales. We purposely did not attempt to alter these expenses when analyzing the re-classified ESP sales.

Comment 12: CEMEX states that the "roller chain" principle should be applied to sales where less than 1% of the value of the product sold in the United States is of the imported merchandise.

Petitioners state that the "roller chain" principle is not applicable to any U.S. sales of cement during the period

of review. Further, petitioners argue that the principle should not extend to any U.S. sales for which the Department uses BIA to calculate U.S. price.

Department's Position: We agree with petitioners. Under the so-called "roller chain" principle, the Department eliminates the assessment of duties on a product if the imported product forms less than 1 percent of the value of the further manufactured product sold in the United States. The Department articulated this approach in Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts thereof from France, 57 FR 28360 (June 24, 1992), and Roller Chain, Other than Bicycle, from Japan, 48 FR 51801 (November 14, 1983). In this case, the value of the product imported in both BIA and non-BIA further manufactured sales exceeds 1 percent. Accordingly, the Department will not apply the "roller chain" principle in this case.

Comment 13: CEMEX argues that the Department incorrectly added the adjustment for uncollected taxes to the U.S. net price in calculating the profit on U.S. further manufactured sales. According to CEMEX, the home market value added tax, real or imputed, bears no relationship to CEMEX's profit on sales of concrete in the United States, and the Department's further manufacturing methodology does not make use of the adjustment for uncollected home market taxes. CEMEX cites to the methodology used by the Department in New Minivans from Japan; Final Determination of Sales at Less than Fair Value (57 FR 21937, 21939, May 26, 1992), as an example to calculate profit on further manufactured sales in the United States.

Department's Position: We agree with CEMEX. In New Minivans from Japan, in calculating the profit on U.S. further manufactured sales, the Department deducted all value added to the minivan after importation, pursuant to section 772(e)(3) of the Act. The value added con-

sisted of the portion of the minivan further manufactured in the United States as well as a proportional amount of profit attributable to the value added. Profit was calculated by deducting from the sales price of the minivan all production and selling costs which the company incurred with respect to the minivan. The resulting profit (or loss) amount was then allocated proportionally to all components of cost, and then only the profit (or loss) attributable to the value added was deducted in arriving at the profit (or loss) on the U.S. further manufactured sales. Consistent with this methodology, the Department does not increase the profit on a further manufactured transaction by the amount of uncollected taxes because those taxes do not contribute to the increased value resulting from further processing in the United States. Accordingly, we made the appropriate changes for our final results.

Comment 14: Petitioners contend that inventory carrying costs should not be added to home market prices when determining sales below cost.

Department's Position: We agree with petitioners and have made the appropriate change in our final results.

Comment 15: Petitioners contend that, as a result of CEMEX's refusal to provide profit data on pozzolanic cement, the Department should use BIA in calculating the profit to be used in constructed value.

CEMEX contends that Department did not require the company to report home market sales of pozzolanic cement, was specifically excluded from the scope of petitioners' antidumping petition, and that including profit from pozzolanic cement is irrelevant since the Department does not have to resort to constructed value in determining its final results.

Department's Position: Because we never resorted to constructive value (CV) for model match purposes, this issue is not relevant to this case.

Comment 16: Petitioners contend that the Department should use a more adverse BIA for the 1991 concrete materials costs at Sunward Material's Tucson Division. Petitioners maintain that CEMEX misled the Department in failing to notify it that it did not calculate product-specific costs for its 1991 Tucson Division concrete materials costs. Petitioners contend that the appropriate BIA to be used for such costs should be based on the highest calculated materials cost from Sunward's Phoenix Division.

CEMEX contends that the Department's application of BIA for added material cost was unnecessary, erroneous, and excessive. CEMEX also contends that the adverse BIA proposed by petitioners is inappropriate because it is based on the costs of another division. CEMEX also contends that the approach taken by the Department in the preliminary results whereby the Tucson Division's 1990 concrete materials costs were used as BIA for 1991 Tucson Division concrete materials is already sufficiently adverse.

Department's Position: We disagree with both petitioners and respondent. CEMEX's U.S. subsidiary, Sunward Materials, did not calculate product-specific costs for any products manufactured at Sunward's Tucson Division during 1991. Instead, respondent applied a single adjustment factor to the 1990 Tucson Division product-specific costs to reflect changes in cost from 1990 to 1991.

Respondent also did not calculate product-specific materials costs for certain types of concrete at Sunward's Tucson and Phoenix Divisions. Rather, Sunward calculated product-specific materials costs for the majority of concrete products manufactured at those two divisions and used an average cost for the remaining products at each division, respectively.

As in our preliminary results, we have had to use BIA for all products for which Sunward did not report product-specific materials costs. For the Phoenix Division, BIA

was based on the highest individually calculated materials costs from the Phoenix Division. The same approach was applied to those costs not specifically calculated at the Tucson Division (*i.e.*, the Tucson Division's highest calculated cost was used). Petitioners' contention that we should apply the highest calculated cost from the Phoenix Division to the 1991 costs at the Tucson Division could be distortive in that the Phoenix Division's cost experience would not necessarily have any relation to the Tucson Division's cost experience. Accordingly, we have not changed our application of BIA to materials cost for these final results.

Comment 17: Respondent contends that the Department erred in disregarding all sales found to be below cost of production without considering whether CEMEX recovers its costs over a reasonable period of time. Respondent also contends that its home market sales were profitable during the period of review and that the costs of specific below-cost sales were recovered.

Petitioners point out that CEMEX concedes that below-cost sales were made over an extended period of time and in substantial quantities. Moreover, petitioners contend that CEMEX did not recover its costs on Type II sales.

Department's Position: We agree that CEMEX's sales below cost were made over an extended period of time without fully recovering cost. Section 773(b) of the Act provides that the Department will determine whether sales are made at less than the cost of producing the subject merchandise. If such sales are not at prices which permit recovery of all costs within a reasonable period of time, such sales shall be disregarded in the determination of FMV. Review of the legislative history regarding this provision indicates that Congress recognized that certain industries have enormous start-up costs which might cause initial sales to be below the COP. These industries, such as the commercial airliner industry mentioned in the House and Senate reports, may incur large research and

development or technology costs which are not immediately recovered by sales (see, *e.g.*, House Report No. 571, 93rd Cong., 1st Sess. 71 (1973)). However, because it is clear that these costs benefit future sales, Congress would not have the Department disregard the below-cost sales if the costs would be recovered, by those future sales, in a reasonable period of time.

The Mexican cement industry is a mature industry, and CEMEX is an established manufacturer. We determined through our analsyis that between 10% and 90% of CEMEX's home market sales were made at prices below cost. Given the lack of information on record to support a belief that CEMEX experienced high start-up costs, or other unusually high expenses in the review period, which would have been recovered by, and benefitted, future sales, we eliminated from our analysis those sales found to be below cost over an extended period of time.

Comment 18: CEMEX argues that inventory carrying expenses should not be subtracted in the calculation of net U.S. purchase price.

Petitioners state that this issue is moot because all sales reported by CEMEX as PP sales are actually ESP sales.

Department's Position: We agree with CEMEX. For those sales determined to be PP sales, the Department has corrected the net PP calculation, excluding inventory carrying costs from the final calculation.

Comment 19: CEMEX argues that the Department incorrectly removed handling and packing revenues from home market prices for comparison to the cost of production in the Department's sales-below-cost test.

Petitioners assert that the Department was correct in excluding handling and packing revenues from the sales-below-cost equation because handling and packing revenues were not included in the cost of production calculation. Consequently, handling and packing revenues are properly not part of the home market net price equation.

Department's Position: We agree with CEMEX. The equation for home market net price used in the preliminary results contained a clerical error. Unlike imputed revenue, handling and packing revenues are properly part of the home market net price equation because they represent actual revenues derived from sales. Accordingly, we have made the appropriate changes for our final results.

Comment 20: CEMEX claims that the Department incorrectly subtracted, rather than added the field SPECIALE in both the profit and the net U.S. price calculations. Because the field SPECIALE represents actual income realized from Sunward's further manufactured sales, CEMEX contends that it should be added to, rather than subtracted from, price to reach net price.

Petitioners argue that the Department was correct to subtract the field SPECIALE in calculating net U.S. price and profit on sales by Sunward because CEMEX failed to explain in the record what is included in the field SPECIALE and how it should be treated in calculating Sunward's net U.S. price and profit.

Department's Position: We agree with CEMEX. The Department examined the field SPECIALE during its vertification of sales made by Sunward. The field SPECIALE represents extra income realized for special charges for coloring, Sunday deliveries, etc. Therefore, the Department has made the necessary correction in the final results.

Uncollected Taxes: On March 19, 1993, the United States Court of Appeals for the Federal Circuit, in affirming the decision in *Zenith Electronics Corp.* v. *United States* (*Zenith Electronics* v. *United States*), Appeals 92-1043, -1044, -1045, -1046 (Fed. Cir. March 19, 1993), ruled that section 772(d)(1)(C) of the Act provides for an addition to U.S. price to account for taxes which the exporting country would have assessed on the merchandise had it been sold in the home market, and that section 773(a)(4)(B) of the Act does not allow circum-

stance-of-sale adjustments to FMV for differences in taxes. Accordingly, we have changed our practice and will no longer calculate a hypothetical tax on the U.S. product, but will, for the time being, add to the U.S. price the absolute amount of tax on the comparison merchandise sold in the country of exportation. By adding the amount of home market tax to U.S. price, absolute dumping margins are not inflated or deflated by differences between taxes included in FMV and those added to U.S. price.

In addition, we will propose a change in 19 CFR 353.2(f)(2) to provide that we will calculate weighted-average dumping margins by dividing the aggregated dumping margins, calculated as described above, by the aggregated U.S. prices net of taxes. This change would result in weighted-average dumping margin rates which are neither inflated nor deflated on account of our methodology of accounting for taxes paid in the home market but rebated or not collected by reason of exportation. We are in the process of drafting this proposed change, and we will begin the rule making process as soon as possible.

Clerical Errors: The Department corrected certain clerical errors which petitioners and respondent noted, as well as clerical errors the Department identified in completing its final results.

Final Results of Review

As a result of our review, we determine the weighted-average dumping margins for the period April 12, 1990, through July 31, 1991, to be:

Company	Margin Percentage
CEMEX, S.A.	30.44
Apasco, S.A. de C.V.	[1] 53.26

The Department will instruct the Customs Service to assess antidumping duties on all appropriate entries. Individual differences between USP and FMV may vary

from the percentages stated above. The Department will issue appraisement instructions directly to the Customs Service.

Furthermore, the following deposit requirements will be effective upon publication of these final results of administrative review for all shipments of the subject merchandise entered, or withdrawn from warehouse for consumption, as provided by section 751(a)(1) of the Act: (1) the cash deposit rate for the reviewed companies will be the rates as listed above; (2) for previously reviewed or investigated companies not listed above, the cash deposit rate will continue to be the company-specific rate published for the most recent period; (3) if the exporter is not a firm covered in this review, a prior review, or the original less-than-fair-value investigation, but the manufacturer is, the cash deposit rate will be the rate established for the most recent period for the manufacturer of the merchandise; and (4) the cash deposit rate for all other manufacturers or exporters will be the "all other" rate of 30.74 percent. This rate represents the highest rate for any firm with shipments in this review, other than those firms receiving a rate based entirely on best information available.

These deposit requirements shall remain in effect until publication of the final results of the next administrative review.

This notice also serves as a final reminder to importers of their responsibility under 19 CFR 353.26 to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

This notice also serves as the only reminder to parties subject to administrative protective order (APO) of their responsibility concerning the return or destruction of pro-

prietary information disclosed under APO in accordance with 19 CFR 353.34(d). Failure to comply is a violation of the APO.

This administrative review and notice are in accordance with section 751(a)(1) of the Tariff Act (19 U.S.C. 1675 (a)(1)) and 19 CFR 353.22.

Dated: April 21, 1993.

Joseph A. Spetrini,

Acting Assistant Secretary for Import Administration.

APPENDIX G

**[First Remand Results (Unpublished)
Dated September 26, 1994]**

THE AD HOC COMMITTEE OF AZ-NM-TX-FL PRODUCERS OF GRAY PORTLAND CEMENT AND NATIONAL CEMENT COMPANY OF CALIFORIA V. CEMEX, S.A. FINAL RESULTS OF REDETERMINATION PURSUANT TO COURT REMAND SLIP OP. 94-151 (SEPTEMBER 26, 1994)

SUMMARY

On September 26, 1994, the Court of International Trade (the Court) remanded to the Department of Commerce (the Department) the final results of its first administrative review of the antidumping duty order on gray portland cement and clinker from Mexico (*Gray Portland Cement and Clinker from Mexico,* 58 FR 25803 (April 28, 1993)). The remand covers one manufacturer/exporter, CEMEX, S.A. de C.V. (CEMEX), and the period April 12, 1990, through July 31, 1991.

On remand, the Court directed the Department to: (1) consider CEMEX's claimed deductions for pre-sale home market transportation costs under the circumstances-of-sale (COS) provision of the Department's regulations; (2) apply a value-added tax (VAT tax) adjustment consistent with the methodology approved in *Torrington Co. v. United States,* 853 F. Supp. 446 (CIT 1994); (3) reclassify three transactions designated as exporter's sales price (ESP) transactions as purchase price (PP) transactions and reconsider our selection of particular best information available (BIA) data for the remaining twelve reclassified sales; and (4) reconsider our selection of particular BIA data for missing added material costs.

On November 25, 1994, we issued draft redetermination results to interested parties for comment. On December 5, 1994, we received comments on the draft redetermination

results from CEMEX and from the petitioner, the Ad Hoc Committee of AZ-NM-TX-FL Producers of Gray Portland Cement.

REDETERMINATION RESULTS

Pre-sale Home Market Transporation Costs

In *The Ad Hoc Committee of AZ-NM-TX-FL Producers of Gray Portland Cement v. United States,* 13 F.3d 398 (CAFC 1994) (hereinafter *Ad Hoc Committee*), the Court of Appeals for the Federal Circuit (Federal Circuit) held that the Department did not have the inherent authority to treat home market pre-sale movement expenses as a direct deduction from foreign market value (FMV). As a result of this ruling, the remand order in the present case directs the Department to "determine to what extent the pre-sale home market transportation costs at issue may be deducted as a COS adjustment in the calculation of "FMV." *The Ad Hoc Committee of AZ-NM-TX-FL Producers of Gray Portland Cement v. United States,* Slip Op. 94-151, at 12 (CIT 1994).

We have determined that we can no longer deduct home market pre-sale movement charges from FMV pursuant to our inherent authority to fill gaps in the antidumping statute. We instead adjust for those expenses under the COS provision of 19 CFR 353.56(a) and the ESP offset provision of 19 CFR 353.56(b)(1) and (2), as appropriate, in the manner described below. This methodology was recently approved by this Court in *The Torrington Co. v. United States,* No. 91-08-00567, Slip. Op. 94-168 (CIT 1994).

When United States price (USP) is based on PP, we only adjust FMV for home market movement charges through the COS provision of 19 CFR 353.56(a). Under this adjustment, we capture only direct selling expenses, which include post-sale movement expenses and, in some circumstances, pre-sale movement expenses. Specifically,

we treat pre-sale movement expenses as direct expenses if those expenses are directly related to the home market sales of the merchandise under consideration.

In order to determine whether pre-sale movement expenses are direct, the Department examines the respondent's pre-sale warehousing expenses, since the pre-sale movement charges incurred in positioning the merchandise at the warehouse are, for analytical purposes, inextricably linked to pre-sale warehousing expenses. If pre-sale warehousing is an indirect expense, then, in the absence of contrary evidence, pre-sale movement expenses should also be treated as an indirect expense. We note that although pre-sale warehousing expenses in most cases have been found to be indirect expenses, these expenses may be deducted from FMV as a COS adjustment in a particular case if the responded is able to demonstrate that the expenses are directly related to the sales under consideration.

Respondent reported in its questionnaire responses of December 23, 1991 (at page B-8), that it incurred any warehousing expenses as direct COS expenses. The Department interprets this to mean that any warehousing expenses incurred are properly classified as pre-sale, indirect selling expenses and that the expense of transporting the cement to the warehouse should also be treated as an indirect expense. Accordingly, the Department has not deducted home market pre-sale movement expenses from FMV for comparison to PP sales. However, we deducted post-sale movement expenses from FMV as a direct expense.

When USP is based on ESP, the Department applies the COS adjustment in the same manner as it does in PP situations. Accordingly, for ESP transactions we deducted home market post-sale movement charges from FMV as direct expenses. We treated pre-sale movement charges as indirect expenses, which we deducted from FMV pursuant to the ESP offset provision set forth in 19 CFR 353.56(b)(1) and (2).

VAT Adjustment

As set out in the Court's remand instructions, the Department redetermined the margin for CEMEX by adding to USP the full amount of home market VAT tax attributable to the export sale without a COS adjustment to FMV, in accordance with our practice as outlined in *Silicomanganese from Venezuela, Preliminary Determination of Sales at Less Than Fair Value*, 59 FR 31204 (June 17, 1994).

In accordance with the CIT decision in *Federal-Mogul Corp. and The Torrington Co. v. United States*, 834 F. Supp. 1391 (CIT 1993), we have multiplied the foreign market tax rate by the price of the U.S. merchandise at the same point in the chain of commerce that the foreign market tax was applied to foreign market sales, and have added the product to the USP. We have also deducted from the USP and the FMV those portions of the respective home market tax and the USP tax adjustments attributable to expenses included in the foreign market and U.S. bases of the tax if we deduct those expenses later to calculate FMV and USP. These adjustments to the foreign market tax and the USP tax adjustment are necessary to prevent the methodology for calculating the USP tax adjustment from creating antidumping duty margins where no margins would exist if no taxes were levied upon foreign market sales.

This margin creation effect is due to the fact that the basis for calculating both the amount of tax included in the price of the foreign market merchandise and the amount of the USP tax adjustment include many expenses that are later deducted when calculating USP and FMV. After we make these deductions, the tax we included in FMV and USP tax adjustment still reflect the inclusion of these expenses in the bases. Thus, a margin may be created that is not dependent upon a difference between adjusted USP and FMV, but is the result of differences between the expenses in the United States and the home market that were deducted through adjustments.

The adjustment to avoid the margin creation effect is in accordance with the Federal Circuit's holding that the application of the USP tax adjustment under section 772 (d)(1)(C) of the Tariff Act of 1930, as amended (the Tariff Act), should not create an antidumping duty margin if pre-tax FMV does not exceed USP. *Zenith Electronics Corp. v. United States,* 988 F.2d 1573, 1582 (Fed. Cir. 1993). The Court has recently affirmed this approach in *Torrinngton Co. v. United States,* 853 F. Supp. 446 (CIT 1994), *Independent Radionic Workers of America v. United States,* Slip. Op. 94-148 (CIT 1994), *Samsung Electronics Co., Ltd. v. United States,* Slip. Op. 94-149 (CIT 1994), and *Zenith Electronics Corp. v. United States,* Slip. Op. 94-146 (CIT 1994).

In sum, we believe the application of the tax rate to the gross price and the subsequent adjustment of expenses addresses the concerns of the courts regarding the adjustment of USP for VAT tax under section 772(d)(1(C) of the Tariff Act.

Applicability of BIA to Reclassified ESP Sales

In the final results of the underlying review, the Department reclassified as ESP transactions, 15 transactions originally classified by CEMEX as PP transactions. However, after the final results were published, the Department determined that three of the fifteen sales were PP sales since the reported sale date was prior to the date of entry recorded on the Customs entry form. Accordingly, the Department requested a remand in order to properly classify these three sales as PP transactions (the Department has continued to treat the remaining twelve sales as ESP sales). The Department has made this correction.

Additionally, the Department requested the opportunity on remand to correct its selection of BIA for the remaining twelve sales that the Department had classified as ESP sales in its final results of review. Specifically, the

Department believes that the use as BIA of the weighted-average of all the ESP adjustments reported by CEMEX resulted in the Department (a) not using actual expense data timely reported by CEMEX for the twelve sales when calculating a net price, and (b) including certain ESP adjustments for the twelve sales that could not have been applicable to these sales.

For this redetermination, we have used the actual expense data applicable to the twelve sales and have not made ESP adjustments to these sales which, although applicable to other ESP transactions, were not applicable to the twelve sales. In order to adjust the price of the twelve sales to reflect indirect selling expenses, however, we have used, as BIA, the highest amount reported for indirect selling expenses incurred on CEMEX's ESP transactions exclusive of further-manufacturing expenses.

Selection of Particular BIA Data for Added Material Costs

In its remand order, the Court states that the Department's "decision to use adverse BIA for . . . added materials costs is supported by substantial evidence in the record and is otherwise in accordance with the law." Nevertheless, the Court directed the Department to "reconsider its selection of particular BIA data . . . for added material costs."

Notably, in affirming the Department's decision to apply BIA to CEMEX in this case, the Court cited approvingly the Department's standard practice regarding the application of partial BIA. Although the Court has instructed the Department to consider CEMEX's proposed BIA methodology, the existence of alternative reasonable methodologies does not warrant the conclusion that the Department's methodology was unreasonable. See *Zenith Radio Corp. v. United States*, 437 U.S. 443, 450 (1978); *ICC Industries, Inc. v. United States*, 812 F.2d 694 (Fed. Cir. 1987). Therefore, we interpret the Court's instructions to mean that we should reconsider whether we have

properly applied our standard BIA methodology in this case or whether CEMEX's proposed methodology is appropriate.

In accordance with the Court's remand order, we have reconsidered the application of our BIA methodology for U.S. added material costs. In the final results of review, the Department used, as BIA, the highest added material cost reported for any sale and applied it, uniformly, to all sales where CEMEX failed to provide such sale-specific information. This material cost was the result of a mechanical application of the conversion factor to the *raw* material cost.

Upon review, we have determined that respondent reported conversion factors and these factors were verified. We have determined that these conversion factors should be used and that, instead of using the highest added material cost as we did in the final results of review, it is more appropriate to select the highest U.S. *raw* material cost, a figure which is the first step in the calculation of material costs and which we extracted from the record, as BIA. In our calculations, we have applied respondent's submitted conversion factor to the raw material cost to derive the final material cost for processing cement into concrete.

ANALYSIS OF COMMENTS RECEIVED

Comment 1:

Petitioner argues that the Department should not have requested additional information on pre- and post-sale movement expenses since CEMEX never argued that the Department should collect such information and the Court did not instruct the Department to do so. Petitioner further argues that the Department should not use his information since it has not been verified. Moreover, petitioner asserts that CEMEX did not identify all source documentation and provide worksheets to support its calculations as requested by the Department.

Department's Position:

We disagree. First, at the time the Department conducted the underlying review, it was the Department's practice to deduct all home market movement expenses from FMV. Based on the Department's practice at that time, CEMEX did not separate, nor did the Department require separation, of pre- and post-sale movement expenses.

In *Ad Hoc Committee*, 13 F.3d at 403, the Federal Circuit held that the Department did not have the inherent authority to treat home market pre-sale movement expenses as a direct deduction from FMV. Since the Department now distinguishes between pre- and post-sale movement expenses when making adjustments to FMV, it is appropriate to provide CEMEX with the opportunity to separate these expenses.

Second, the Court did not prescribe the specific method by which the Department should consider CEMEX's claim for a COS adjustment covering pre-sale movement expenses. Thus, it is of no consequence that the Court did not instruct the Department to request additional information. The Court left the details of this proceeding, including the collection of additional information, to the discretion of the Department.

Third, while these expenses have not been verified, they are comparable to movement expenses that the Department verified during the conduct of the review. Additionally, CEMEX provided documentation to support its figures which the Department found to be sufficient in explaining the claimed pre- and post-sale movement expenses.

Comment 2:

Petitioner disagrees with the Department's treatment of movement expenses for home market sales. First, petitioner argues that the Department should not have used movement expenses from the Atotonilco plant through

the Mixcoac and Sta. Catarina terminals to the ultimate customer as a surrogate for movement expenses from the Atotonilco plant through the Vallejo terminal to the ultimate customer. Petitioner contends that as BIA, the Department should treat movement expenses incurred on sales from the Atotonilco plant through the Vallejo terminal to the ultimate customer as indirect selling expenses since CEMEX failed to separate this expense into pre- and post-sale movement as requested by the Department.

Second, petitioner argues that the Department should treat as an indirect expense the movement expense incurred by CEMEX to ship merchanudise from the Valles terminal to the ultimate customer. Petitioner suggests that such movement may contain pre-sale movement expenses. Specifically, petitioner argues that the movement expense CEMEX reported for sales from the Valles terminal may contain movement expense to transport the cement from the Valles plant to the Valles terminal, an expense petitioner maintains is an indirect pre-sale expense. Petitioner contends that the record evidence does not show how close the terminal is to the plant.

Third, petitioner argues that, in any event, the Department should not have used the reported data for Type I cement as a proxy for the actual movement expense for Type II cement that CEMEX failed to provide for movement expense from the Valles terminal to the ultimate customer.

Department's Position:

We agree with the petitioner that we should not use proxies in cases where a respondent has failed to provide actual expense data that the Department has requested and has failed to explain why the information could not be provided. When a respondent makes a claim for an adjustment to FMV it is the respondent's responsibility to establish the claim to the satisfaction of the Department

(see section 353.54 of the Department's regulations). In our letter of November 2, 1994, we requested that Cemex separate movement expenses into pre-and post-sale movement expenses for all home market sales. Since CEMEX failed to separate movement expenses into pre- and post-sale movement expenses for sales of cement from the Atotonilco plant through the Vallejo terminal to the ultimate customer, we have treated these movement expenses as indirect selling expenses for these final results of redetermination.

The Department does not agree with the petitioner that movement expenses reported for shipment of merchandise from the Valles terminal to the ultimate customer should be treated as an indirect selling expense. In its November 9, 1994, submission (at Appendix 2, page 7) CEMEX reported that the plant/terminal combination for Valles plant to Valles terminal shipments includes only post-sale movement since the terminal is located at the plant. Since the terminal is located at the plant, the Department considers the movement expense reported from the terminal to the customer to be a direct, post-sale movement expense.

We agree with the petitioner that movement expenses incurred on sales of Type I cement from the Valles terminal to the ultimate customer should not be used as a proxy for movement expenses incurred on Type II cement from the Valles terminal to the customer, that CEMEX failed to provide. Since movement expenses for Type II cement were not provided for sales from the Valles terminal to the customer, the Department did not make any adjustment for this expense when calculating the foreign market price.

Comment 3:

Petitioner argues that the Department should not have used two different VAT tax rates in the home market and one VAT tax rate in the United States. Petitioner asserts that this methodology distorts fair value comparisons since

the VAT tax rate applied in the United States differs from the VAT tax rate applied on certain home market sales. Petitioner argues that the Department should use a 15 percent VAT tax rate for all home market and U.S. sales as it did in the original less-than-fair-value (LTFV) investigation, or it should use the weighted-average home market VAT tax rate for all home market and U.S. sales.

Department's Position:

We agree with the petitioner. In order to make fair value comparisons we should use either the 15 percent VAT tax rate for all home market and U.S. sales or the weighted-average home market VAT tax rate. For these remand results, we have used the 15 percent VAT tax rate as we did in the original LTFV investigation, since this rate applies to almost all home market destinations.

Comment 4:

Petitioner argues that for the twelve PP sales reclassified as ESP sales, the Department's use of the weighted-average indirect selling expenses incurred on ESP sales as BIA is not in accordance with the Court's remand order. Petitioner argues that this methodology results in the application of neutral BIA rather than adverse BIA. Petitioner states that the Court upheld the Department's use of adverse BIA in this case. Petitioner contends that the Department should use, as adverse BIA, the highest amount reported for indirect selling expenses incurred on CEMEX's ESP transactions, exclusive of further-manufacturing expenses.

CEMEX argues that the Department should not have used the weighted-average indirect selling expenses reported for ESP sales when making deductions to the twelve reclassified PP sales. Instead, CEMEX contends that the Department should have used the indirect selling expenses for sales to a particular U.S. company.

Department's Position:

We agree with the petitioner. The Court's remand order states, in pertinent part:

> In the present case . . . the data was not missing because Commerce had failed to make an appropriate request for it, but rather because CEMEX misclassified the data in its submission. Thus, Commerce acted reasonably in resorting to BIA for the missing data. Further, CEMEX submission of the correct indirect selling expense data to Commerce was untimely—after verification and two weeks before the final results were issued—thus preventing Commerce from verifying the information. Pursuant to 19 C.F.R. § 353.37(a), Commerce was justified in rejecting the data submitted untimely and in resorting to BIA. (*The Ad Hoc Committee on AZ-NM-TX-FL Producers of Gray Portland Cement v. United States,* Slip Op. 94-151, at 18-19 (CIT), September 26, 1994)).

The Court goes on to state that the Department's application of adverse BIA was appropriate and that to accept CEMEX's contention that "neutral" information should be applied in this case would undermine the purpose of the BIA provision (CEMEX had claimed that the Department should use as neutral BIA the weighted average of the indirect selling expenses).

Accordingly, for these final results of retermination, we have used, as BIA, the highest amount reported for indirect selling expenses incurred on CEMEX's ESP transactions, exclusive of further-manufacturing expenses.

Comment 5:

Petitioner notes that the Department's revised BIA methodology regarding the selection of adverse partial BIA for unreported material costs complies with the Court's remand and CEMEX's proposed methodology.

Department's Position:

We agree. The Department's analysis of this issue was addressed in the preceding section on added materials cost.

Comment 6:

CEMEX argues that the Department should correct five inadvertent computer programming errors that occurred in the Department's U.S. and home market calculations.

Department's Position:

The Department agrees with CEMEX that inadvertent computer programming errors should be corrected for these final results. To that end, the Deparment has corrected three errors that CEMEX identified and that the Department agrees are, in fact, inadvertent computer programming errors. These errors are: (1) improper coding of the variable defining TYPE II cement when making adjustments for pre- and post-sale movement expenses; (2) misplacement of the variables defining the month and year; and (3) failure to take home market indirect selling expenses into account when performing the VAT tax adjustment.

However, two additional programming instructions challenged by CEMEX do not reflect "inadvertent computer programming errors". These are an adjustment to the ESP offset cap and profit calculations. Since the Court's remand order does not direct the Department to address these methodological issues and because these issues were not the result of actions taken by the Department in this redetermination, the Department has not addressed these issues further.

Comment 7:

CEMEX argues that when calculating the VAT tax adjustment, the Department should not have made additional adjustments to USP and FMV by substracting the

portion of the VAT tax attributable to all expenses later deducted in the calculation of USP and FMV since this is contrary to the plain language of the statute (section 772 (d)(1)(C) of the Act) and judicial precedent (*Zenith Electronics Corp. v. United States*, 988 F.2d 1573 (Fed. Cir. 1993)). CEMEX further asserts that the Department's attempts to avoid creating dumping margins where dumping margins would otherwise not exist does not justify the Department's failure to comply with the statute and judicial precedent. Moreover, CEMEX claims that this methodology leads to extremely high margins when applied to further-manufactured products.

CEMEX contends that the additional adjustments to USP and FMV are contrary to the Federal Circuit's requirement that the tax adjustment be made at the same point the stream of commerce in both the U.S. and home market (see *Daewoo Electronics Co., Ltd. v. United States*, 6 F.3d 1511 (Fed. Cir. 1993) (*Daewoo*)). CEMEX argues that by stripping out those portions of the VAT tax attributable to certain expenses which the Department deducts from FMV in the calculation of the tax adjustment, the Department is effectively changing the point in the stream of commerce at which the Mexican authorities impose the VAT. CEMEX states further that, because the expenses deducted from the tax calculation for USP are different from those stripped out in the calculation of the home market VAT tax, the Department is applying the VAT tax to USP at a different point in the stream of commerce in violation of *Daewoo*.

CEMEX contends that the statute and judicial precedent authorize the Department to adjust for home market taxes not collected on U.S. sales by reason of export by adding the full amount of home market tax that would have been collected had the sale been made in the home market. Accordingly, CEMEX asserts that for the final results of redetermination, the Department must add to USP the

full amount of VAT tax (less discounts and rebates) without any further adjustments.

CEMEX asserts that if the methodology used in the draft remand results is applied in the final results of redetermination, the Department should deduct from the VAT tax in both markets the portion of the VAT tax attributable to all expenses, rather than limit such deductions to direct expenses incurred on home market and U.S. sales.

Department's Position:

We disagree with CEMEX that the Department's VAT tax methodology is contrary to the statute and judicial precedent. As noted above, the courts have recently affirmed the Department's VAT tax approach in *Torrington Co. v. United States,* 853 F. Supp. 446 (CIT 1994), *Independent Radionic Workers of America v. United States,* Slip Op. 94-144 (CIT 1994), *Zenith Electronics Corp. v. United States,* Slip Op. 94-148 (CIT 1994), *Samsung Electronics Co., Ltd. v. United States,* Slip Op. 94-149 (CIT 1994), and *Zenith Electronics Corp. v. United States,* Slip Op. 94-146 (CIT 1994).

We disagree with CEMEX's assertion that we are applying the VAT tax to USP at a different point in the stream of commerce in violation of *Daewoo.* We believe the application of the tax rate to the gross price and the subsequent adjustment of expenses addresses the concerns of the courts regarding the adjustment of USP for VAT tax under section 772 (d)(1)(C) of the Tariff Act. For a more thorough explanation of the Department's position see the preceding section on VAT tax.

We agree with the respondent that we should deduct the portion of the VAT tax attributable to all expenses, rather than limit such deductions to direct expenses incurred on home market and U.S. sales. As noted in com-

ment 6 above, for these final redetermination results, we have accounted for the VAT tax attributable to indirect selling expenses.

Comment 8:

CEMEX argues that the Department should not have linked its analysis of home market movement expenses with its analysis of home market warehousing expenses. CEMEX contends that while pre-sale warehousing expenses may be indirectly related to sales, pre-sale movement expenses nonetheless may be directly related to sales and, therefore, properly deducted from FMV as a COS adjustment. Distinctions between direct and indirect expenses, CEMEX argues, may reflect nothing more than the state of a particular respondent's financial records. Records that demonstrate a direct relationship between the expense and the subject sales may be present in the case of movement expenses, and simply absent in the case of warehousing expenses.

CEMEX also contends that this methodology is particularly inappropriate where, as here, the Department based its classification of warehousing expenses upon information collected during the underlying administrative review when the Department did not link its analysis of movement expenses with its analysis of warehousing expenses, and, therefore, CEMEX saw little point in establishing that its warehousing expenses were directly related to sales. Had it known during the administrative review that its ability to obtain a COS adjustment for home market movement expenses would eventually turn on its ability to obtain a COS adjustment for home market warehousing expenses, CEMEX would have presented such evidence during the administrative review.

Finally, CEMEX argues that even if the Department's methodology is in accordance with law, the Department did not apply the correct COS test. CEMEX contends

that the appropriate test for making a COS adjustment changed in 1988. According to CEMEX, the Court of International Trade in *Asahi Chemical Industry Co. v. United States,* 692 F. Supp. 1376 (CIT 1988), reh'g granted, dismissed as moot, 727 F. Supp. 625 (CIT 1989), held that the requirement in 19 C.F.R. § 353.56(a) of a "direct relationship" between expenses and sales does not require that the expenses be directly tied to a particular sale. Rather, CEMEX states, the test is more concerned with whether the expenses are tied to export sales or to sales of merchandise outside the scope of the antidumping order. Had the Department applied the correct test, CEMEX argues, it would have determined that all expenses associated with the warehousing and movement of CEMEX's cement in Mexico are directly related to sales and, therefore, entitled to a COS adjustment.

Department's Position:

We disagree with CEMEX. First, we did not apply the wrong COS test. The respondent bases its argument on the CIT decision in *Asahi.* The court in *Asahi* did not weaken or alter the directly related test (see *NTN Bearing Corp. v. United States,* 747 F. Supp. 726 (CIT 1990) (quoting from *Asahi* and applying the directly related test)). *Asahi* merely held that, under certain circumstances, pre-sale expenses may qualify as COS adjustment. Indeed, where the facts in a particular case have supported such a conclusion, we have made a COS adjustment for pre-sale expenses. *See, e.g.; Polyethylene Terephthalate Film, Sheet, and Strip from Japan,* 56 Fed Reg. 16300, 16303 (Apr. 22, 1991).

Moreover, the facts of *Asahi* are distinguishable from this case. In *Asahi,* warehousing expenses were shown to be related solely to merchandise sold in the home market. The court placed emphasis on this fact in remanding the treatment of warehousing expenses in that case. In the

present case, CEMEX incurs warehousing expenses on both its home market and U.S. sales.

We have followed our standard practice in evaluating CEMEX's movement expenses. In determining whether a given pre-sale expense is direct or indirect, we look to see whether it is directly related to the home market sales of the merchandise under consideration. *See, e.g., Replacement Parts for Self-Propelled Bituminous Paving Equipment from Canada,* 59 Fed. Reg. 59993, 59994 (Nov. 21, 1994); *LMI Metalli Industriale, S.p.a. v. United States,* 912 F.2d 455, 457 (Fed. Cir. 1990) (distinguishing general costs of doing business from expenses directly tied to sales).

The facts in this case are essentially the same that were before the courts in *The Torrington Co. v. United States,* No. 91-08-00567, Slip Op. 94-168 (CIT 1994) and *Ad Hoc Committee of AZ-NM-TX-FL Producers of Gray Portland Cement v. United States,* No. 90-10-00508, Slip Op. 94-152 (CIT 1994). In both cases, we determined (i) that warehousing and movement expenses are, for analytical purposes, inextricably linked, and (ii) that if pre-sale warehousing is an indirect expense, then, in the absence of contrary evidence, pre-sale movement expenses should also be treated as an indirect expense. The court in *Torrington* and *Ad Hoc* upheld this methodology. As the court in *Ad Hoc* stated:

> CEMEX contends that Commerce erred when it failed to find CEMEX's pre-sale transportation costs directly related to sales, and thus in failing to deduct these costs from FMV for PP comparison purposes. CEMEX argues that the transportation costs at issue were those related to moving cement to warehouses that were specifically for facilitating sales transactions. Nevertheless, the court concurs with Commerce that CEMEX has not demonstrated that this particular pre-sale expense is directly related to sales. *Spe-*

> *cifically, the court agrees that if the pre-sale warehousing expense in this case is not shown to be a direct expense, then it follows that the cost of transporting the cement to the warehouse is also not shown to be a direct expense.*

Ad Hoc, Slip Op. 94-152 at 3 (emphasis added). These court decisions support the Department's conclusion in these remand results that CEMEX's pre-sale movement expenses should be treated as indirect expenses.

Second, with respect to CEMEX's suggestion that it has not been afforded the opportunity to demonstrate that its warehousing expenses are direct expenses, we note that during the underlying administrative review, CEMEX was given every opportunity to demonstrate that its home market warehousing expenses should be subtracted from FMV as a COS adjustment. For example, in section B.5 of our questionnaire, we asked CEMEX to report whether, and to what extent, its home market warehousing expenses qualified as a COS adjustment. CEMEX reported in its questionnaire response of December 23, 1991 (at page B-8), that it incurred "no after-sale warehousing" expenses. Interpreting this as a negative response, we did *not* make a COS adjustment for CEMEX's warehousing expenses. Not only was this determination reasonable, given CEMEX's response and the totality of the evidence, but CEMEX did not challenge this determination in the present proceeding. Moreover, in its supplemental questionnaire response of April 30, 1992, at Exhibit B-13, CEMEX included home market warehousing expenses in its calculation of indirect selling expenses.

Third, to the extent the present redetermination turns on the proper classification of CEMEX's warehousing and movement expenses, it is not based *exclusively* upon information collected during the underlying administrative review. Over the objection of petitioners, the Department permitted CEMEX to supplement the administrative rec-

ord on remand with new information regarding its expenses. In its October 19, 1994 and November 9, 1994, submissions, CEMEX argued that its warehousing and pre-sale movement expenses for sales through one of its terminals should be treated as direct expenses. In particular, CEMEX claimed that it knew at the time these expenses were incurred that they were for sales to a particular customer because that customer purchased the majority of the merchandise sold from the terminal.

All of this information was considered by the Department for purposes of our remand determination. We have determined that the warehousing and pre-sale movement expenses for the sales in question do not constitute direct expenses. Not all of the cement shipped to the terminal in question was destined for one customer. Rather, CEMEX's terminal acted as a distribution terminal from which regional orders were filled. Therefore, the warehousing expense and the movement expenses for transporting cement to the terminal were not directly related to sales. Accordingly, in this situation, as in all situations in this review, we treated these expenses as indirect expenses and we deducted post-sale movement expense from FMV as a direct expense.

RESULTS OF REDETERMINATION

The weighted-average margin in the amended final results published on September 23, 1993, was 40.27 percent (58 FR 49471). As a result of our analysis, we have determined that the antidumping margin for CEMEX on redetermination is 61.49 percent. If the Court approves these results of redetermination, the Department will instruct the U.S. Customs Service to liquidate entries according to these results. Individual differences between USP and FMV may vary from the percentage stated above. The Department will issue appraisement instruction directly to the U.S. Customs Service.

/s/ Paul L. Joffe
PAUL L. JOFFE
Deputy Assistant Secretary
for Import Administration

Date: 5 January 1995

APPENDIX H

**[Second Remand Results (Unpublished)
Dated May 15, 1995]**

THE AD HOC COMMITTEE OF AZ-NM-TX-FL PRODUCERS OF GRAY PORTLAND CEMENT AND NATIONAL CEMENT COMPANY OF CALIFORNIA V. CEMEX, S.A.
FINAL RESULTS OF REDETERMINATION PURSUANT TO COURT REMAND SLIP OP. 95-91 (MAY 15, 1995)

SUMMARY

On May 15, 1995, the Court of International Trade (the Court) remanded to the Department of Commerce (the Department) the final results of its first administrative review of the antidumping duty order on gray portland cement and clinker from Mexico (*Gray Portland Cement and Clinker from Mexico,* 58 FR 25803 (April 28, 1993)). The remand covers one manufacturer/exporter, CEMEX, S.A. de C.V. (CEMEX), and the period April 12, 1990, through July 31, 1991. This is the second remand ordered by the Court in this case. In its remand order, the Court directed the Department to: (1) recalculate its value-added-tax (VAT) adjustment to account for the fact that CEMEX's home market sales incurred VAT at two different rates; and, (2) recalculate CEMEX's purchase price (PP) margin calculations to reflect changes made to foreign market value (FMV) in the exporters' sales price (ESP) computer program.

REDETERMINATION RESULTS

VAT Adjustment

During the period of review CEMEX had some market sales that were subject to a 15 percent VAT rate and sales that were subject to a 6 percent VAT rate. For the final

results, we calculated the VAT adjustment by applying a VAT rate of 15 percent to all sales made during the period of review. The Court remanded this determination to the Department with instructions to recalculate the VAT adjustment taking into account the 6 percent transactions. Slip Op. 95-91 at 11. In accordance with the Court's order, we calculated a weighted-average VAT rate and applied this amount to all home market and U.S. sales when making our VAT adjustment.

Recalculation of PP Margin Calculation

In the first redetermination we recalculated dumping margins for ESP sales after correcting our original FMV calculation. However, we neglected to recalculate dumping margins for PP sales. In accordance with the Court's instructions, we have corrected this clerical error for this redetermination and recalculated dumping margins for PP as well as ESP sales.

RESULTS OF REDETERMINATION

As a result of the change in the VAT rate and the recalculation of dumping margins on PP sales, CEMEX's weighted-average margin is 61.42 percent. If the Court approves these final results of redetermination, the Department will instruct the U.S. Customs Service to liquidate entries according to these results. Individual differences between USP and FMV may vary from the percentage stated above. The Department will issue appraisement instructions directly to the U.S. Customs Service.

/s/ Paul L. Joffe
PAUL L. JOFFE
Deputy Assistant Secretary
for Import Administration

Date: June 14, 1995

APPENDIX I

[Excerpt from Brief for United States Filed December 12, 1995]

BRIEF FOR DEFENDANT-APPELLEE,
THE UNITED STATES

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

95-1485

THE AD HOC COMMITTEE OF AZ-NM-TX-FL
PRODUCERS OF GRAY PORTLAND CEMENT,
Plaintiff-Appellee,

v.

THE UNITED STATES,
Defendant-Appellee,

and

CEMEX, S.A.,
Defendant-Appellant.

Appeal from a Decision of the
United States Court of International Trade in 93-05-0273
Entered July 12, 1995, from Judge Jane A. Restani

* * * *

B. CEMEX Waived Any Objection To Commerce's Application Of The *Torrington I* VAT Methodology By Its Failure To Make A Timely Objection [2]

* * * *

[2] Should the Court hold that the CIT abused its discretion in so holding, the Court should remand the matter to the CIT for Commerce to apply the VAT methodology which this Court recently approved in *Federal Mogul Corp.*, 63 F.3d at 1572.

APPENDIX J

STATUTORY PROVISIONS

UNITED STATES CODE ANNOTATED
TITLE 19. CUSTOMS DUTIES
CHAPTER 4—TARIFF ACT OF 1930
SUBTITLE III—ADMINISTRATIVE PROVISIONS
PART III—ASCERTAINMENT, COLLECTION, AND RECOVERY OF DUTIES

§ 1516a. Judicial review in countervailing duty and anti-dumping duty proceedings

(a) Review of determination

(1) Review of certain determinations

Within 30 days after the date of publication in the Federal Register of—

(A) a determination by the administering authority, under section 1671a(c) or 1673a(c) of this title, not to initiate an investigation,

(B) a determination by the Commission, under section 1675(b) of this title, not to review a determination based upon changed circumstances,

(C) a negative determination by the Commission, under section 1671b(a) or 1673(b) of this title, as to whether there is reasonable indication of material injury, threat of material injury, or material retardation, or

(D) a final determination by the administering authority or the Commission under section 1675(c)(3) of this title,

an interested party who is a party to the proceeding in connection with which the matter arises may commence an action in the United States Court of International Trade by filing concurrently a summons and complaint, each with the content and in the form, manner, and style prescribed by the rules of that court, contesting any factual

findings or legal conclusions upon which the determination is based.

(2) Review of determinations on record

(A) In general

Within thirty days after—

(i) the date of publication in the Federal Register of—

(I) notice of any determination described in clause (ii), (iii), (iv), (v), or (viii) of subparagraph (B)

(II) an antidumping or countervailing duty order based upon any determination described in clause (i) of subparagraph (B), or

(III) notice of the implementation of any determination described in clause (vii) of subparagraph (B), or

(ii) the date of mailing of a determination described in clause (vi) of subparagraph (B),

an interested party who is a party to the proceeding in connection with which the matter arises may commence an action in the United States Court of International Trade by filing a summons, and within thirty days thereafter a complaint, each with the content and in the form, manner, and style prescribed by the rules of that court, contesting any factual findings or legal conclusions upon which the determination is based.

(B) Reviewable determinations

The determinations which may be contested under subparagraph (A) are as follows:

(i) Final affirmative determinations by the administering authority and by the Commission under section 1671d or 1673d of this title, including any negative part of such a determination (other than a part referred to in clause (ii)).

(ii) A final negative determination by the administering authority or the Commission under section 1671d or 1673d of this title, including, at the option of the appellant, any part of a final affirmative determination which specifically excludes any company or product.

(iii) A final determination, other than a determination reviewable under paragraph (1), by the administering authority or the Commission under section 1675 of this title.

(iv) A determination by the administering authority, under section 1671c or 1673c of this title, to suspend an antidumping duty or a countervailing duty investigation, including any final determination resulting from a continued investigation which changes the size of the dumping margin or net counteravailable subsidy calculated, or the reasoning underlying such calculations, at the time the suspension agreement was concluded.

(v) An injurious effect determination by the Commission under section 1671c(h) or 1673c(h) of this title.

(vi) A determination by the administering authority as to whether a particular type of merchandise is within the class or kind of merchandise described in an existing finding of dumping or antidumping or countervailing duty order.

(vii) A determination by the administering authority or the Commission under section 3538 of this title concerning a determination under title VII of the Tariff Act of 1930 [19 U.S.C.A § 1671 et seq.].

(viii) A determination by the Commission under section 1675b(a)(1) of this title.

* * * *

(b) Standards of review

(1) Remedy

The court shall hold unlawful any determination, finding, or conclusion found—

(A) in an action brought under subparagraph (A), (B), or (C) of subsection (a)(1) of this section, to be arbitary, capricious, an abuse of discretion, or otherwise not in accordance with law, or

(B)(i) in an action brought under paragraph (2) of subsection (a) of this section, to be unsupported by substantial evidence on the record, or otherwise not in accordance with law, or

(ii) in an action brought under paragraph (1)(D) of subsection (a) of this section, to be arbitary, capricious, an abuse of discretion, or otherwise not in accordance with law.

UNITED STATES CODE ANNOTATED
TITLE 19. CUSTOMS DUTIES
CHAPTER 4—TARIFF ACT OF 1930
SUBTITLE IV—COUNTERVAILING AND ANTIDUMPING DUTIES
PART III—REVIEWS; OTHER ACTIONS REGARDING AGREEMENTS
SUBPART A—REVIEW OF DUTY AND AGREEMENTS OTHER THAN QUANTITATIVE RESTRICTION AGREEMENTS

§ 1675. Administrative review of determinations

(a) Periodic review of amount of duty

(1) In general

At least once during each 12-month period beginning on the anniversary of the date of publication of a countervailing duty order under this subtitle or under section 1303 of this title, and antidumping duty order under this subtitle or a finding under the Antidumping Act, 1921, or a notice of the suspension of an investigation, the administering authority, if a request for such a review has been received and after publication of notice of such review in the Federal Register, shall—

(A) review and determine the amount of any net countervailable subsidy,

(B) review, and determine (in accordance with paragraph (2)), the amount of any antidumping duty, and

(C) review the current status of, and compliance with, any agreement by reason of which an investigation was suspended, and review the amount of any net countervailable subsidy or dumping margin involved in the agreement,

and shall publish in the Federal Register the results of such review, together with notice of any duty to be assessed, estimated duty to be deposited, or investigation to be resumed.

(2) Determination of antidumping duties

(A) In general

For the purpose of paragraph (1)(B), the administering authority shall determine—

(i) the normal value and export price (or constructed export price) of each entry of the subject merchandise, and

(ii) the dumping margin for each such entry.

(B) Determination of antidumping or countervailing duties for new exporters and producers

(i) In general

If the administering authority receives a request from an exporter and producer of the subject merchandise establishing that—

(I) such exporter or producer did not export the merchandise that was the subject of an antidumping duty or countervailing duty order to the United States (or, in the case of a regional industry, did not export the subject merchandise for sale in the region concerned) during the period of investigation, and

(II) such exporter or producer is not affiliated (within the meaning of section 1677(33) of this title) with any exporter or producer who exported the subject merchandise to the United States (or in the case of a regional industry), who exported the subject merchandise for sale in the region concerned) during that period,

the administering authority shall conduct a review under this subsection to establish an individual weighted average dumping margin or an individual countervailing duty rate (as the case may be) for such exporter or producer.

(ii) Time for review under clause (i)

The administering authority shall commence a review under clause (i) in the calendar month beginning after—

(I) the end of the 6-month period beginning on the date of the countervailing duty or antidumping duty order under review, or

(II) the end of any 6-month period occurring thereafter,

if the request for the review is made during that 6-month period.

(iii) Posting bond or security

The administering authority shall, at the time a review under this subparagraph is initiated, direct the Customs Service to allow, at the option of the importer, the posting, until the completion of the review, of a bond or security in lieu of a cash deposit for each entry of the subject merchandise.

(iv) Time limits

The administering authority shall make a preliminary determination in a review conducted under this subparagraph within 180 days after the date on which the review is initiated, and a final determination within 90 days after the date the preliminary determination is issued, except that if the administering authority concludes that the case is extraordinarily complicated, it may extend the 180-day period to 300 days and may extend the 90-day period to 150 days.

(C) Results of determinations

The determination under this paragraph shall be the basis for the assessment of countervailing or antidumping duties on entries of merchandise covered by the determination and for deposits of estimated duties.

(3) Time limits

(A) Preliminary and final determinations

The administering authority shall make a preliminary determination under subparagraph (A), (B), or (C) of

paragraph (1) within 245 days after the last day of the month in which occurs the anniversary of the date of publication of the order, finding, or suspension agreement for which the review under paragraph (1) is requested, and a final determination under paragraph (1) within 120 days after the date on which the preliminary determination is published. If it is not practicable to complete the review within the foregoing time, the administering authority may extend that 245-day period to 365 days and may extend that 120-day period to 180 days. The administering authority may extend the time for making a final determination without extending the time for making a preliminary determination, if such final determination is made not later than 300 days after the date on which the preliminary determination is published.

* * * *

APPENDIX K

RULE 29.6 STATEMENT
CEMEX SUBSIDIARIES

MEXICO:

Agricola Prima, S.C.; Anahauc Administracion, S.C.; Anahuac Empresa Inmobiliaria, S.A.; Arcilla, Calia y Yeso Anahauc, S.A.; Arenera del Oriente, S.A. de C.V.; Arrendadora de Marquinaria Equipo y Inmuebles, S.A. de C.V.; Cal Guadalajara, S.A. de C.V.; Cecord Inc.; Cegusa, S.A.; Cemento Portland Nacional, S.A. de C.V.; Cementos Anahauc, S.A. de C.V.; Cementos Anahauc del Atlantico, S.A. de C.V.; Cementos Anahauc del Pacifico, S.A.; Cementos Atoyac, S.A. de C.V.; Cementos de Oritente, S.A. de C.V.; Cementos del Pacifico S.A. de C.V.; Cementos del Valle, S.A. de C.V.; Cementos del Yaqui, S,A. de C.V.; Cementos Guadalajara, S.A. de C.V.; Cementos Maya, S.A.; Cementos Sinaloa, S.A. de C.V.; Cementos Tolteca, S.A. de C.V.; Cia. de Transportes del Mar de Cortes, S.A. de C.V.; Comercializadora Cemex del Pacifico, S.A. de C.V.; Compania Minera Atoyac, S.A. de C.V.; Concreto Premezclado Nacional, S.A. de C.V.; Concretos y Precolados, S.A. de C.V.; Conceretos de Alta Calidad y Agregados, S.A. de C.V.; Concretos del Bajio, S.A.; Concretos Guadalajara, S.A. de C.V.; Concretos Procesados, S.A.; Concretos Tamaulipas, S.A.; Concretos y Agregados de California, S.A. de C.V.; Distribuidora Mexicana de Marteriales, S.A.; Empresas Tolteca de Mexico, S.A. de C.V.; Empresas Turisticas Cemex/Mariott, S.A. de C.V.; Explotadora de Canteras, S.A. de C.V.; Fomento de Cultura Obrera de Tlanepantla, A.C.; Fomento Industrial, S.A. de C.V.; Granos y Terrenos, S.A. de C.V.; Grupo Anahauc, S.A. de C.V.; Grupo Tolteca, S.A. de C.V.; Immobiliaria Angeles Segovia, S.A.; Inmobiliaria Industrial Mazatleca, de C.V.; Grupo Tolteca, S,A. de C.V.; Inmobiliaria S.A. de C.V.; Inmobiliaria Z.P. Triangular, S.A. de C.V.;

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Excavac. CAVOEX; WC Inc.; Yalisto, C.A.; Yesos Macuro, C.A.

CAYMAN ISLANDS:

Anmar Inc.; Caribe Enterprises; Cecar, Inc.; Cetra, Inc.; Serkatia; Sunbulk Shipping Inc.

UNITED STATES OF AMERICA:

Cemago Investments Inc.; Cementos del Mar Inc.; Florida Sun Cement Co. Inc.; Gray Stone of Kentucky, Inc.; Interamerican Investments, Inc.; Norval, Inc.; Orlandomex, Inc.; Red Rock of Minnesota, Inc.

PANAMA:

Ceser, S.A.; Dixon Corporation; Maritima del Golfo, S.A.; Operadora Cementera Maritima, S.A.

REPUBLICA DOMINICANA:

Hispano Dominicana de Cemento Blanco, S.A.; Hotelera del Atlantico, S.A.

OTHERS:

Cardington Ltd. (Bermuda); Ciments Blanc du Maroc, S.A. (Morocco); Desa Portugal (Portugal); Maya-Belize Cement Limited (Belize); Sandworth Plaza Holding B.V. (Netherlands); South East Enterprises, Inc. (British Virgin Islands)

Supreme Court, U.S.
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No. 96-846

In the Supreme Court of the United States

OCTOBER TERM, 1996

CEMEX, S.A., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner waived its objection to the application of the so-called Torrington methodology for calculating antidumping duties by failing to raise that objection in a timely fashion.

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In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-846

CEMEX, S.A., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is unpublished, but the decision is noted at 95 F.3d 1164 (Table). The opinions of the Court of International Trade are reported at 17 I.T.R.D. (BNA) 2440 (Pet. App. 8a); 17 I.T.R.D. (BNA) 1648 (Pet. App. 9a-18a); and 865 F. Supp. 857 (Pet. App. 19a-38a).

JURISDICTION

The judgment of the court of appeals was entered on August 1, 1996. A petition for rehearing was denied on October 7, 1996. Pet. App. 7a. The petition for a writ of certiorari was filed on November 27, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner contests the imposition of antidumping duties upon Mexican gray portland cement by the International Trade Administration of the United States Department of Commerce (Commerce). Commerce imposed those duties pursuant to Section 731 of the Trade Agreements Act of 1979 (1979 Trade Act), 19 U.S.C. 1673, which requires the imposition of duties on foreign-made goods sold at less than fair market value when such sales materially injure or threaten to materially injure domestic industries. The original antidumping order on Mexican gray portland cement was published on August 29, 1990. *Gray Portland Cement and Clinker From Mexico*, 55 Fed. Reg. 35,371 (1990). Pursuant to Section 751(a) of the 1979 Trade Act, 19 U.S.C. 1675(a), Commerce conducted a periodic review of the applicable duties and on April 28, 1993, published its final determination of that review. *Gray Portland Cement and Clinker From Mexico*, 58 Fed. Reg. 25,803 (1993).

2. In an action filed in the Court of International Trade (CIT) pursuant to Section 516A of the 1979 Trade Act, 19 U.S.C. 1516a, the Ad Hoc Committee of AZ-NM-TX-FL Producers of Gray Portland Cement (Ad Hoc Committee), a respondent herein, contested that final determination. Petitioner CEMEX intervened as a defendant.

One of the issues raised in that proceeding concerned the methodology employed by Commerce in calculating an adjustment to the antidumping duties. Commerce had applied what has come to be known as the Federal-Mogul methodology in adjusting for Mexico's value-added tax (VAT). See *Federal-Mogul Corp.* v. *United States*, 834 F. Supp. 1391, 1396 (Ct.

Int'l Trade 1993) (*Federal-Mogul I*), rev'd, 63 F.3d 1572 (Fed. Cir. 1995) (*Federal-Mogul II*). That methodology adjusts the antidumping duties based upon the absolute amount of the VAT. In *Federal-Mogul I*, however, the CIT held that the Federal-Mogul methodology was not in accordance with law. As a result of that decision, the Ad Hoc Committee contested Commerce's use of that methodology in its review of the duties on Mexican cement. Commerce proposed that the CIT remand the matter so that it could apply a new methodology, the so-called Torrington methodology, that had been used in *Torrington Co.* v. *United States*, 853 F. Supp. 446, 448-449 (Ct. Int'l Trade 1994). The Torrington methodology adjusts the antidumping duties based upon the foreign-market tax rate.

In an opinion filed September 26, 1994, the CIT remanded the matter to Commerce, directing it to "apply its new VAT methodology as approved in *Torrington*." Pet. App. 29a. The court specifically noted that petitioner agreed that Commerce should apply that methodology: "Commerce thus agrees that the Court should remand this case for VAT adjustment, *as does CEMEX*." *Id.* at 29a (emphasis added).[1]

3. On remand, Commerce recalculated the antidumping duties according to the Torrington methodology. Pet. App. 68a-88a. During the administrative remand proceedings, petitioner expressed its general

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[1] In its petition, CEMEX concedes that it "did not initially object to the CIT's order that the *Torrington* methodology be used, but subsequently argued to Commerce and to the CIT that modifications were necessary to the *Torrington* methodology." Pet. 4.

approval of the use of that methodology. See *id.* at 16a.

4. Petitioner appealed the results of the first remand to the CIT. Among other contentions, petitioner urged the court to hold that Commerce should not have applied the Torrington methodology. Pet. App. 16a. The CIT declined to consider that objection on the ground that "CEMEX did not address this issue in a timely manner." *Ibid.* In so holding, the CIT noted that petitioner had not raised any objection to the application of the Torrington methodology when the court entertained oral argument on the motion to remand: "At oral argument prior to remand, the court indicated it would direct Commerce to apply its new VAT methodology as used in the * * * cases * * * decided by the judge in Torrington. * * * All parties apparently understood that the VAT methodology was the one described in Torrington." *Id.* at 16a & n.7. The CIT further noted that, in proceedings pursuant to the remand order, petitioner affirmatively urged Commerce to apply the Torrington methodology. *Id.* at 16a. The CIT reasoned that "[a]s to the specific application of Torrington to these facts, CEMEX had an obligation, before it supported Torrington or acquiesced in it, to examine application of the new VAT methodology to its product if it wanted to claim an exception from the methodology for this case." *Id.* at 16a-17a.

While rejecting as untimely petitioner's objection to the use of the Torrington methodology, the CIT remanded the proceedings to Commerce a second time for corrections unrelated to the issue of application of the Torrington methodology.

5. After Commerce issued the results of the second remand, Pet. App. 89a, petitioner again appealed to

the CIT, objecting both to the results and to the use of the Torrington methodology. In an opinion issued July 12, 1995, the CIT sustained the second remand results. *Id.* at 8a. The CIT also rejected petitioner's challenge to the Torrington methodology:

> Contrary to Cemex's objections all parties were aware that on remand the court was ordering [Commerce] to apply its new methodology, which was approved in *Torrington Co. v. United States*, 853 F. Supp. 446, 448-9 (1994). As previously indicated, Cemex also affirmatively led [Commerce] to believe it supported that approach. Cemex's new challenge to [Commerce]'s VAT methodology is untimely.

Ibid.

6. Petitioner appealed the CIT's judgment sustaining the second remand results to the Court of Appeals for the Federal Circuit. Petitioner argued that prior to the first remand it had not been on notice that the Torrington methodology would be used and therefore should not have been expected to object to it. Pet. App. 4a. Petitioner further argued that the court should reject as contrary to law the use of the Torrington methodology.[2]

The court of appeals affirmed the CIT's holding that petitioner waived any challenge to the application of the Torrington methodology. Pet. App. 4a. The court concluded that the CIT "correctly found that CEMEX did not properly articulate its objection

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[2] While petitioner's appeal was pending, and before petitioner filed its opening brief, the court of appeals issued its opinion in *Federal-Mogul II*, in which it reversed the CIT's decision in *Federal-Mogul I*, holding that the Federal-Mogul methodology was not contrary to law. 63 F.3d at 1580.

when it should have" and "never objected to the court's direction to apply that methodology on remand." *Ibid.* The court noted that the CIT found that petitioner had affirmatively accepted application of the Torrington methodology. *Ibid.* As a result, the court held that petitioner had failed to show that the CIT abused its discretion in finding that petitioner's objections to the Torrington methodology were untimely. Because it concluded that petitioner did not timely object to application of the Torrington methodology, the court of appeals did not review the merits of Commerce's use of that VAT methodology. *Ibid.*

ARGUMENT

The court of appeals correctly upheld the trial court's holding that petitioner waived any objection to the application of the Torrington methodology. That decision is correct and does not conflict with any decision of this Court or any other court of appeals. Further review of this case is not warranted.

1. Petitioner argues (Pet. 6-8) that under Section 516A(a) of the 1979 Trade Act, 19 U.S.C. 1516a(a), the only proper subject of judicial review is the final determination by Commerce in a periodic review of antidumping orders. According to petitioner, "Commerce's inclusion of the *Torrington* methodology in its June 1995 court-ordered remand results is not the correct subject of judicial review." Pet. 7. That argument is quite curious given that petitioner seeks reversal of the decision upholding the application of the Torrington methodology. In any event, petitioner misconstrues Section 516A(a). While that Section does provide a cause of action in the CIT to challenge a Department of Commerce final determination, it also authorizes the CIT to remand that determina-

tion to the Department of Commerce. 19 U.S.C. 1516a(c)(3). Furthermore, 28 U.S.C. 1295(a)(5) confers jurisdiction on the Court of Appeals for the Federal Circuit to review final judgments of the CIT. Accordingly, the CIT's decision to order Commerce to use the Torrington methodology and petitioner's failure to object to that order were properly presented to the court of appeals and are properly before this Court.

2. Petitioner waived its objection to the use of the Torrington methodology by failing to object to it prior to the first remand. In its petition for certiorari, petitioner has abandoned the argument it presented to the court of appeals, that its failure to object to the application of the Torrington methodology should be excused for lack of notice. Prior to the first remand, the CIT explicitly stated that the Department of Commerce should apply the Torrington methodology, and petitioner subsequently voiced its approval of that methodology. Pet. App. 16a. Accordingly, the courts below correctly ruled that petitioner was on notice that the Torrington methodology would be applied, and that its failure to object to that methodology prior to the first remand therefore constituted a waiver of the objection.

Petitioner now asserts for the first time that it was not required to object to the application of the Torrington methodology because that methodology was mandated by then-controlling precedent, which was subsequently reversed in a decision that should have bound the court of appeals in this case. Because petitioner did not raise that argument in the courts below, it is not properly before this Court. *Matsushita Elec. Indus. Co.* v. *Epstein*, 116 S. Ct. 873, 880 n.5 (1996); *Department of Revenue of Montana* v.

Kurth Ranch, 511 U.S. 767, 772 n.9 (1994); *United States* v. *Alvarez-Sanchez*, 511 U.S. 350, 360 n.5 (1994); *United States* v. *Williams*, 504 U.S. 36, 40 (1992). Furthermore, whether the court of appeals properly followed its own precedent is not the type of question ordinarily reviewed by this Court. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties," including "doubt about the respect to be accorded to a previous decision of a different panel.").

In any event, the central premises of petitioner's argument are incorrect. First, petitioner errs in asserting (Pet. 6) that at the time of the first remand, the CIT's previous decision in *Federal Mogul I* constituted a controlling decision. The decision of one judge of the CIT in a different case is not controlling in other proceedings conducted by the same or other judges. *Algoma Steel Corp. v. United States*, 865 F.2d 240, 243 (Fed. Cir.), cert. denied, 492 U.S. 919 (1989). If petitioner had any objection to the application of the Torrington methodology, or believed that the *Federal-Mogul I* court was wrong to reject the Federal-Mogul methodology, petitioner could have presented its argument to the trial court and the trial court could have considered and addressed the two methodologies.

Second, petitioner incorrectly asserts (Pet. 8-14) that the court of appeals' decision in *Federal-Mogul II* mandates the use of the Federal-Mogul methodology. In *Federal-Mogul II*, the court of appeals held that the Federal-Mogul methodology was "not precluded" by the statutory language and was not "an unreasonable way" to implement statutory policy. 63 F.3d at 1580. The court did not hold that the Federal-

Mogul methodology was mandated by law or that the Torrington methodology was contrary to law. *Federal-Mogul II* thus did not alter the validity of the Torrington methodology, and application of that methodology does not conflict with *Federal-Mogul II*. Accordingly, the principle urged by petitioner (Pet. 9-12), that a change in the law should apply to all pending cases, has no relevance here. Nor does the decision in *Federal-Mogul II* excuse petitioner's failure to make a timely objection to the application of the Torrington methodology.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1997

Supreme Court, U.S.
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No. 96-846

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

CEMEX, S.A.,
Petitioner,
v.
UNITED STATES OF AMERICA, and
THE AD HOC COMMITTEE OF AZ-NM-TX-FL
PRODUCERS OF GRAY PORTLAND CEMENT,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF IN OPPOSITION FOR THE AD HOC COMMITTEE OF AZ-NM-TX-FL PRODUCERS OF GRAY PORTLAND CEMENT

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January 31, 1997

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether, under the circumstances of this case, the court below correctly held that the Court of International Trade ("CIT") did not abuse its discretion in finding that Petitioner waived its right to appeal a methodology used by the International Trade Administration of the U.S. Department of Commerce ("Commerce") in an antidumping administrative review by failing to make a timely objection where (1) Petitioner's failure to object was not excused by any subsequent judicial decision changing the law applicable to Commerce's methodology in a manner favorable to Petitioner; (2) the law concerning Commerce's methodology was unsettled at the time of Petitioner's failure to object; and (3) Commerce's methodology was in dispute before the CIT.

PARTIES TO THE PROCEEDING

Respondent, The Ad Hoc Committee of AZ-NM-TX-FL Producers of Gray Portland Cement ("Ad Hoc Committee"), makes the following statement pursuant to Rule 29.6 of this Court. The Ad Hoc Committee is an informal association composed of U.S. producers of gray portland cement and cement clinker. The members of the Ad Hoc Committee and their parent companies and non-wholly owned subsidiaries, if any, are listed below:

Florida Crushed Stone Company

Holnam, Inc. (subsidiary of Holderbank Financiere Glaris Ltd.)

North Texas Cement Company (joint venture of Ash Grove Cement Company and P.C. Investments Inc.)

Phoenix Cement Company

Riverside Cement Company (subsidiary of Ssangyong Cement Industrial Company, Ltd.)

Southdown, Inc.

Texas Industries, Inc.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-846

CEMEX, S.A.,

Petitioner,

v.

UNITED STATES OF AMERICA, and
THE AD HOC COMMITTEE OF AZ-NM-TX-FL
PRODUCERS OF GRAY PORTLAND CEMENT,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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BRIEF IN OPPOSITION FOR THE AD HOC COMMITTEE OF AZ-NM-TX-FL PRODUCERS OF GRAY PORTLAND CEMENT

STATEMENT

1. Commerce issued an antidumping order on imports of gray portland cement and clinker from Mexico on August 30, 1990. *Gray Portland Cement And Clinker From Mexico,* 55 Fed. Reg. 35,443 (1990). The antidumping order was based on Commerce's determination that gray portland cement and clinker from Mexico were sold in the United States at less than fair value and a determination by the U.S. International Trade Commission that U.S. cement producers located in the southern tier states were materially injured by reason of dumped imports from Mexico. *Gray Portland Cement And Clinker*

From Mexico, 55 Fed. Reg. 29,244 (1990); *Gray Portland Cement And Cement Clinker From Mexico*, 55 Fed. Reg. 35,371 (1990).

As a result of the antidumping order, importers were required to post cash deposits of estimated antidumping duties on future entries of gray portland cement and clinker from Mexico. The rate of estimated duties was determined by the dumping margin found by Commerce in its final determination in the antidumping investigation.

Under 19 U.S.C. § 1675, at the request of any party, Commerce must conduct an annual administrative review of the antidumping order. The purpose of such a review is to determine the actual antidumping duties owed by importers for entries of merchandise covered by the order during the review period. Pet. App. 97a-100a. Importers are assessed antidumping duties at the rate determined by Commerce in the review, which also establishes the new cash deposit rate for future entries covered by the order. If no party requests a review, the duties are assessed at the cash deposit rate determined in the original investigation or the most recent administrative review.

2. On April 28, 1993, Commerce issued the final results of the first administrative review of the antidumping order on gray portland cement from Mexico—the review at issue in this case. That review covered imports during April 12, 1990-July 31, 1991. *Gray Portland Cement And Clinker From Mexico*, 58 Fed. Reg. 25,803 (1993) (Pet. App. 39a-67a). Under the antidumping law in effect at the time of Commerce's final results,[1] Commerce determined the dumping margin

[1] The antidumping law was revised in 1994 by the Uruguay Round Agreements Act ("URAA"), Pub. L. No. 103-465. Although the process by which Commerce conducts antidumping investigations and administrative reviews and determines dumping margins remains essentially unchanged, the 1994 amendments changed some of the statutory terminology and altered certain methodologies,

by comparing the foreign market value ("FMV") of the merchandise in question to its U.S. price. FMV and U.S. price were determined by making various adjustments, set out in the statute, to the gross selling prices to customers in the foreign market and in the United States. 19 U.S.C. §§ 1677a & 1677b (reprinted in the appendix to this brief at 6a-18a).

Among the adjustments set forth in the statute was a requirement that Commerce increase the U.S. price by "the amount of any taxes imposed in the country of exportation directly upon the exported merchandise or components thereof, which have been rebated, or which have not been collected, by reason of the exportation of the merchandise to the United States." 19 U.S.C. § 1677a(d)(1)(C) (reprinted in the appendix to this brief at 7a).[2] Therefore, the statute required Commerce to adjust the U.S. price, not FMV, to account for direct taxes (such as value-added taxes) that were imposed on merchandise sold in the exporting country but that were forgiven on merchandise exported to the United States. Nevertheless, prior to the CIT's 1986 decision in *Zenith Elec. Corp. v. United States*, 633 F. Supp. 1382 (Ct. Int'l Trade 1986), *appeal dismissed*, 875 F.2d 291 (Fed. Cir. 1989) ("*Zenith I*"), Commerce accounted for such

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including the methodology at issue in this case. Under section 291 of the URAA, however, the amendments apply only to antidumping investigations and administrative reviews initiated after January 1, 1995, and thus do not apply to this case.

[2] Section 224 of the Uruguay Round Agreements Act (reprinted in the appendix to this brief at 19a) amended the antidumping law to require that the adjustment for such taxes be made by reducing the price at which the merchandise is sold in the country of exportation, not by adding to the price at which it is sold in the United States. As discussed in note 1, *supra*, this amendment is effective only for antidumping investigations and administrative reviews initiated after the January 1, 1995 effective date of the URAA and thus does not affect the methodology Commerce used in this case.

taxes by deducting from FMV the amount of tax assessed on merchandise sold in the home market. Commerce did so because of its concern that adding the amount of such taxes to the U.S. price had a "multiplier effect" that artificially increased the dumping margin. *Id.* at 1386 n.9. *Zenith I* ruled that Commerce's methodology was contrary to the statute.

As a result of the CIT's decision in *Zenith I*, Commerce changed its methodology for accounting for foreign direct taxes that are forgiven on export sales. Commerce adjusted U.S. price, but also made a "circumstance of sale" deduction to FMV under 19 U.S.C. § 1677b(a)(4)(B) (reprinted in the appendix to this brief at 10a) to offset the "multiplier effect." The U.S. Court of Appeals for the Federal Circuit ("Federal Circuit"), however, determined on March 19, 1993, that this methodology was contrary to the statute. *Zenith Elec. Corp. v. United States*, 988 F.2d 1573 (Fed. Cir. 1993) ("*Zenith II*").

Slightly more than a month thereafter, on April 28, 1993, Commerce issued the final results of the administrative review underlying this case. Commerce acknowledged the Federal Circuit's decision in *Zenith II* and stated that it was using a new methodology (the "*Federal-Mogul* methodology")[3] of "add[ing] to the U.S. price the absolute amount of tax on the comparison merchandise sold in the country of exportation." Pet. App. 64a-65a. Commerce applied this methodology in adjusting for Mexican value-added tax ("VAT") that was imposed on sales of cement in Mexico but not on exports of cement to the United States.

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[3] This methodology is referred to as the *Federal-Mogul* methodology because, as discussed below, it was subsequently upheld by the Federal Circuit in *Federal-Mogul Corp. v. United States*, 63 F.3d 1572 (Fed. Cir. 1995).

3. Both the Ad Hoc Committee and Petitioner, CEMEX, S.A., appealed Commerce's final results to the CIT. The Ad Hoc Committee challenged Commerce's use of the *Federal-Mogul* methodology, contending that it was inconsistent with the statute. Before the issue was briefed to the CIT in this case, another CIT judge acting in a different case ruled that the *Federal-Mogul* methodology was contrary to the statute. *Federal-Mogul Corp. v. United States*, 834 F. Supp. 1391 (Ct. Int'l Trade 1993) ("*Federal-Mogul I*"), *rev'd*, 63 F.3d 1572 (Fed. Cir. 1995).

In response to the CIT's ruling in *Federal-Mogul I*, Commerce developed a fourth methodology (the "*Torrington* methodology")[4] for adjusting for foreign direct taxes forgiven on export sales. Under the *Torrington* methodology, Commerce (1) multiplied the price of the mechandise sold in the United States by the tax rate applicable to merchandise sold in the home market and added the result to the U.S. price and (2) made further adjustments to both the U.S. price and the home market price to prevent the tax adjustment from creating dumping margins that would not exist if no tax were imposed on home market sales.

Before the CIT, defendant, the United States, submitted a brief on April 18, 1994, acknowledging the decision in *Federal-Mogul I* and requesting the CIT to "remand the case so that Commerce may make the VAT adjustment consistent with its new practice," *i.e.*, the *Torrington* methodology (the relevant portion of the Government's CIT brief is reproduced in the appendix to this brief at 1a). To eliminate any possible misunderstanding as to which methodology it was proposing that Commerce use on remand, the Government cited Commerce's deter-

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[4] This methodology is referred to as the *Torrington* methodology because, as discussed below, it was subsequently upheld by the CIT in *Torrington Co. v. United States*, 853 F. Supp. 446 (Ct. Int'l Trade 1994).

mination in *Certain Stainless Steel Wire Rods From France*, 58 Fed. Reg. 68,865, 68,866 (1993), applying the *Torrington* methodology. In a brief filed the same day (the relevant portion of which is reproduced in the appendix to this brief at 2a), Petitioner also argued that the CIT should remand to Commerce in light of the CIT's decision in *Federal-Mogul I*.

On May 24, 1994, prior to oral argument before the CIT in this case, the same CIT judge who decided *Federal-Mogul I* upheld the new *Torrington* methodology. *Torrington Co. v. United States*, 853 F. Supp. 446 (Ct. Int'l Trade 1994). That methodology was subsequently upheld by the CIT in numerous other cases.[5]

The CIT held oral argument in this case on August 10, 1994. As of that date, nearly four months had passed since the Government had requested the CIT to remand the case to permit Commerce to apply its new *Torrington* methodology. Two and a half months had passed since the CIT upheld that methodology in the *Torrington* decision. Neither at the oral argument nor in any written submission to the CIT prior to oral argument did Petitioner object to the remand requested by the Government.[6]

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[5] *See, e.g., Independent Radionic Workers of America v. United States*, 862 F. Supp. 422 (Ct. Int'l Trade 1994); *Zenith Elec. Corp. v. United States*, 18 Ct. Int'l Trade 882 (1994); *Zenith Elec. Corp. v. United States*, 18 Ct. Int'l Trade 870 (1994); *Samsung Elec. Co. v. United States*, 18 Ct. Int'l Trade 891 (1994).

[6] Before the Federal Circuit, Petitioner complained that the CIT judge, in expressing her intent to remand the VAT issue during oral argument, did not specifically refer to the *Torrington* methodology. Pet. App. 4a. Given the clear reference in the Government's brief to Commerce's use of that methodology in another antidumping case and the fact that the CIT had recently approved that methodology, however, Petitioner had no basis for misunderstanding which methodology Commerce was to use on remand. *Id.* As the CIT noted, Pet. App. 16a n.7, all parties "apparently understood" what the court meant when it referred at oral argument to

In its decision of September 26, 1994, the CIT stated:

> Commerce concedes that in *Federal-Mogul Corp. v. United States,* 834 F. Supp. 1391, 1396 (Ct. Int'l Trade 1993), the court rejected the manner in which Commerce had been interpreting *Zenith Elecs. Corp. v. United States,* 988 F.2d 1573, 1582 n.4 (Fed. Cir. 1993), when making a VAT adjustment. Commerce thus agrees that the court should remand this case for VAT adjustment, as does CEMEX. The court further instructs Commerce that it shall apply its new VAT methodology as approved in *Torrington Co. v. United States,* 853 F. Supp. 446, 448-49 (Ct. Int'l Trade 1994).

Pet. App. 29a.

On October 19, 1994, in its first submission to Commerce following the CIT's remand order (the relevant portion of which is reproduced in the appendix to this brief at 4a), Petitioner noted the CIT's instruction that Commerce "apply its new VAT methodology as approved in *Torrington Co. v. United States*, 18 CIT ——, 853 F. Supp. 446, 448-49 (1994)" and argued that Commerce "should therefore apply its new methodology in accordance with the Court's instructions." Thus, not only was Petitioner under no misapprehension as to the methology Commerce was to use on remand, but it affirmatively urged Commerce to use that methodology. Only on December 5, 1994—nearly eight months after the Government's request for a remand to apply the *Torrington* methodology and over two months after the CIT's remand order—did Petitioner first raise an objection to that methodology. On that date, Petitioner submitted com-

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the VAT methodology approved in the "Avesta cases and the cases decided by the judge in *Torrington*." The *Torrington* methodology was also affirmed by the CIT in *Avesta Sheffield, Inc. v. United States,* 18 Ct. Int'l Trade 246 (1994). In any event, Petitioner concedes before this Court that it failed to timely object to the CIT's remand to Commerce to apply the *Torrington* methodology. *See* Pet. 4.

ments on Commerce's draft redetermination on remand objecting to certain aspects of the *Torrington* methodology. As conceded in its petition to this Court, Petitioner "did not initially object to the CIT's order that the *Torrington* methodology be used," and it only "subsequently argued to Commerce and to the CIT that modifications were necessary to the *Torrington* methodolgy [sic]." Pet. 4.

As required by the CIT's order, Commerce's September 26, 1994 final determination on remand applied the *Torrington* methodology and rejected Petitioner's newfound objections to that methodology. Pet. App. 71a-72a and 80a-83a. On May 15, 1995, the CIT affirmed Commerce's application of the *Torrington* methodology on remand, but remanded again to Commerce on other grounds. The CIT rejected Petitioner's belated objections to the *Torrington* methodology:

> CEMEX contests the secondary adjustments in the new VAT methodology where Commerce "adjust[s] . . . the foreign market tax and the USP tax adjustment" to account for expenses deducted in calculating FMV and USP. . . . CEMEX's challenges, however, to Commerce's application of its new VAT methodology were not raised until the remand proceedings in this case. CEMEX also never raised objection to the court's direction for Commerce to apply, on remand, the *Torrington*-approved VAT methodology. On the contrary, in a submission to Commerce on remand, CEMEX made an affirmative statement of support for the *Torrington*-approved methodology. *See* Admin. Pub. Doc. 2, at 6 ("[Commerce] should . . . apply its new [*Torrington*-approved VAT] methodology in accordance with the Court's instructions.") Thus, the court will not here consider for the first time general challenges to that methodology.
>
> As to the specific application of *Torrington* to these facts, CEMEX had an obligation, before it

> supported *Torrington* or acquiesced in it, to examine application of the new VAT methodology to its product if it wanted to claim an exception from the methodology for this case. CEMEX's attempts to challenge the new VAT methodology now are untimely.

Pet. App. 16a-17a.

Commerce issued its determination pursuant to the CIT's second remand order on June 14, 1995. Pet. App. 89a-90a. The CIT sustained this determination in a decision dated July 12, 1995, which also rejected Petitioner's renewed argument that it did not waive its objection to the *Torrington* methodology:

> Contrary to Cemex's objections all parties were aware that on remand the court was ordering ITA to apply its new methodology, which was approved in *Torrington Co. v. United States*, 853 F. Supp. 446, 448-49 (1994). As previously indicated, Cemex also affirmatively led ITA to believe it supported that approach. Cemex's new challenge to the ITA's VAT methodology is untimely.

Pet. App. 8a.

4. Petitioner appealed to the Federal Circuit. While that appeal was pending, the Federal Circuit reversed *Federal-Mogul I* and held that the *Federal-Mogul* methodology constituted a reasonable exercise of Commerce's discretion to interpret the statute. *Federal-Mogul Corp. v. United States*, 63 F.3d 1572 (Fed. Cir. 1995) ("*Federal-Mogul II*"). In particular, the Federal Circuit approved Commerce's goal of applying a methodology that was "tax-neutral" and did not distort the dumping margin. *Id.* at 1580. Importantly, in ruling that Commerce's use of the *Federal-Mogul* methodology was permissible under the statute, the Federal Circuit did not find that other methodologies were impermissible. In fact, recognizing that Commerce was no longer using the *Federal-Mogul* methodology, the Federal Circuit required

the CIT on remand to determine whether Commerce "wishe[d] to continue utilizing" the *Federal-Mogul* methodology. *Id.* at 1582. *Federal-Mogul II* did not overrule the CIT's decision in *Torrington* or even address the *Torrington* methodology. Although Commerce chose to resume using the *Federal-Mogul* methodology after it was upheld by the Federal Circuit, that court has never had occasion to rule on whether the *Torrington* methodology is a permissible interpretation of the statute. As discussed above, the CIT has repeatedly held that it is permissible.

5. In this case, the Federal Circuit affirmed the CIT's ruling that Petitioner waived its objection to the *Torrington* methodology. Pet. App. 1a-6a. The Federal Circuit "agree[d] with the government that CEMEX waived its right to object to application of the *Torrington* methodology" and "conclude[d] that CEMEX did not timely object to application of the *Torrington* methodology." Pet. App. 4a. The Federal Circuit reasoned:

> The Court of International Trade correctly found that CEMEX did not properly articulate its objection when it should have. The court found that CEMEX's challenges to the *Torrington* methodology were not raised until the remand proceeding at Commerce, that CEMEX never objected to the court's direction to apply that methodology on remand. The court did not err in its conclusion. Failure of the court to specifically refer to *Torrington* did not excuse CEMEX from raising any objection it may have had because the court had recently approved use of that methodology. [Citation omitted]. CEMEX had reason to expect that Commerce would use it on remand. The court found that CEMEX itself made an affirmative statement accepting application of the *Torrington* methodology. In particular, the court found that CEMEX stated in a submission to Commerce on remand: "[Commerce] should . . . apply its new [*Torrington*-approved VAT] methodology in accordance with the Court's instructions." *Ad Hoc Comm.*, No. 95-91, slip op. at

> 10 (alteration in original). CEMEX has thus failed to show that the court abused its discretion in finding that CEMEX's objections to the *Torrington* methodology were untimely.

Pet. App. 4a.

REASONS FOR DENYING THE PETITION

I. PETITIONER MISSTATES THE FACTS OF THIS CASE

The petition for certiorari is predicated on a contrary-to-fact representation. Petitioner asserts that the Federal Circuit's decision in *Federal-Mogul II* constituted a "controlling" or "binding" precedent, Pet. 6 and 9, that changed the law applicable to Commerce's methodology for adjusting for direct taxes forgiven on export sales. Petitioner further contends that, in light of the new law it claims was announced in *Federal-Mogul II*, the Federal Circuit was obligated to remand to Commerce to apply the *Federal-Mogul* methodology despite Petitioner's admitted failure to timely object to Commerce's use of the *Torrington* methodology. Petitioner, in fact, goes so far as to assert that *Federal-Mogul II* "reversed" the CIT's decision in *Torrington*. *See* Pet. (i) ("By failing to object to a then controlling judicial decision, does a party waive application of a subsequent *reversal* of that decision?") (emphasis added). *See also* Pet. 6 ("At bottom, the CAFC's decision stands for the proposition that a party, by failing to object to a then controlling judicial decision, waives the application of a subsequent *reversal* of that decision.") (emphasis added).

Contrary to Petitioner's representation, the CIT's decision upholding the *Torrington* methodology, which was followed in this and numerous other CIT decisions, was not reversed by the Federal Circuit in *Federal-Mogul II*. In fact, *Torrington* has never been overruled or questioned by any subsequent judicial decision. The only issue decided by the Federal Circuit in *Federal-Mogul II* was

whether Commerce's use of the *Federal-Mogul* methodology constituted a reasonable interpretation of the statute. The *Torrington* methodology was not at issue in *Federal-Mogul II*, and nothing in *Federal-Mogul II* casts doubt upon or discredits the *Torrington* methodology.[7] Commerce's decision to resume using the *Federal-Mogul* methodology after the Federal Circuit's decision solely reflects Commerce's choice to use that methodology, not judicial disapproval of the *Torrington* methodology.[8] Thus, contrary to Petitioner's representation, the current state of the law is that both the *Torrington* methodology and the *Federal-Mogul* methodology have been upheld by the courts as permissible interpretations of the statute.

Accordingly, the petition for certiorari is based on an erroneous premise.[9] There has been no change in the law

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[7] The Federal Circuit's approval of Commerce's goal of making a "tax-neutral" adjustment that does not distort the dumping margin, 63 F.3d at 1580, strongly suggests that the *Torrington* methodology would be permissible under the statute, because it was designed to achieve a tax-neutral result by preventing the creation of a dumping margin that would not exist in the absence of the adjustment. *See* Commerce's September 26, 1994 redetermination on remand, Pet. 71a-72a. As Petitioner conceded in its brief to the Federal Circuit (the relevant portion of which is reproduced in the appendix to this brief at 5a), "*Federal Mogul II* implies that alternative VAT methodologies may also be found lawful."

[8] Petitioner states that, after *Federal-Mogul II*, Commerce "returned to use of the *Federal Mogul* methodology in all subsequent cases" but this case. Pet. 4-5. Contrary to Petitioner's suggestion that it was unfairly singled out for disparate treatment, however, there is no evidence that any party to any other case failed to timely object to Commerce's use of the *Torrington* methodology. Thus, because only Petitioner acquiesced in the *Torrington* methodology, there are no similarly situated parties that were treated differently from Petitioner.

[9] Petitioner also argues that the *Federal-Mogul* methodology used by Commerce in the final results of the administrative review —not the *Torrington* methodology used on remand from the CIT—

applicable to Commerce's use of the *Torrington* methodology. The absence of such a change is fatal to Petitioner's theory why the Court should grant certiorari. Because *Torrington* was not overruled or invalidated—much less "reversed"—by *Federal-Mogul II*, there is no basis for Petitioner's assertion that *Federal-Mogul II* required the court below to excuse Petitioner's admitted failure to timely object to the *Torrington* methodology.[10]

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is "the correct subject of judicial review" in this case. Pet. 6-7. Thus, argues Petitioner, despite the decisions of the CIT and the Federal Circuit upholding Commerce's use of the *Torrington* methodology, the *Federal-Mogul* methodology must be affirmed unless it is contrary to law. This claim is based on a misreading of 19 U.S.C. § 1516a(a)(2)(B)(iii). Although that provision provides a right of review by the CIT of final Commerce determinations in administrative reviews, it does not dictate the subject matter of subsequent appeals to the Federal Circuit or to this Court, which are shaped by the intervening decisions of each court in the chain of review. The Federal Circuit reviews the decision of the CIT, and this Court reviews the decision of the Federal Circuit, not Commerce's final results. *See* 28 U.S.C. § 1295(a)(5); 28 U.S.C. § 1254 (reprinted in the appendix to this brief at 18a). Thus, contrary to Petitioner, the appropriate focus of this Court's review is the decision of the Federal Circuit that the CIT did not abuse its discretion in finding that Petitioner waived its right to appeal the *Torrington* methodology. Petitioner also reasons that it is somehow inappropriate to review Commerce's use of the *Torrington* methodology because it "represents the *CIT*'s views on what methodology should be used"—not Commerce's views. Pet. 7 (emphasis in original). This argument disregards the fact that the *Torrington* methodology was devised by Commerce, not the CIT. More importantly, in the absence of any decision overruling *Torrington*, there is no basis for excusing Petitioner's waiver of its objection to the *Torrington* methodology and no way to resurrect the *Federal-Mogul* methodology at this stage of the case.

[10] Petitioner's insistence that "[s]ince there is neither a Supreme Court nor an *en banc* decision contrary to *Federal-Mogul II*, the CAFC in this instance is bound to adhere to its own prior determination that the *Federal-Mogul* methodology was in accordance with law," Pet. 8, is beside the point. Given Petitioner's admitted failure to timely object to the *Torrington* methodology, the Federal Circuit had no reason to require application of any other methodology in this case.

II. THE DECISION BELOW DOES NOT RAISE AN IMPORTANT QUESTION OF FEDERAL LAW THAT REQUIRES RESOLUTION BY THIS COURT

Petitioner asserts that the Court should grant certiorari because the issue of waiver raised in this case is an "important federal question." Pet. 6. The law is well established, however, that, "absent exceptional circumstances," a reviewing court does not consider an issue that was not timely raised in the court below. *United States v. Lovasco*, 431 U.S. 783, 788 n.7 (1977). *See also Air Courier Conf. of America v. American Postal Workers Union*, 498 U.S. 517, 522-23 (1991); *Singleton v. Wulff*, 428 U.S. 106, 120 (1976); *United States v. Ortiz*, 422 U.S. 891, 898 (1975). The Federal Circuit's decision that the CIT did not abuse its discretion in finding that Petitioner waived its right to appeal Commerce's use of the *Torrington* methodology by failing to make a timely objection is consistent with this longstanding general rule and the Federal Circuit's own precedent. *See, e.g., L.E.A. Dynatech v. Allina*, 49 F.3d 1527, 1531 (Fed. Cir. 1995).

Importantly, as this Court stated in *Singleton*, 428 U.S. at 121, "[t]he matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of the individual case." The Federal Circuit itself correctly reviewed the CIT's decision in this case on an abuse of discretion standard. Pet. App. 4a. The decisions of both courts turned on the particular facts of this case, that is, on Petitioner's failure, despite ample notice and opportunity, to raise its objection to the *Torrington* methodology prior to remand and its affirmative statement to Commerce on remand that Commerce should apply that methodology. Because the decision whether Petitioner waived its objection to the *Torrington* methodology was a matter within the discretion of the courts below based on the facts of this case, the petition for certiorari plainly does not raise an important question of federal law that requires resolution by this Court.

In addition, as discussed in nn. 1 and 2, *supra*, the underlying issue in this case—the methodology used by Commerce in adjusting for foreign value-added taxes and other direct taxes forgiven on export sales—has been mooted for all cases other than this case. Section 224 of the Uruguay Round Agreements Act, Pub. L. No. 103-465, amended the antidumping law to definitively establish the methodology to be used in all investigations and administrative reviews initiated after January 1, 1995. Section 224 amended 19 U.S.C. § 1677b(a)(6)(B)(iii) to provide that the adjustment be made by reducing the price at which the merchandise is sold in the country of exportation, not by adding to the price at which it is sold in the United States. Because the issue of Commerce's methodology raised in this case cannot affect any other case, the petition for certiorari does not raise an important question of law requiring resolution by this court.

III. THE DECISION BELOW DOES NOT CONFLICT WITH THE DECISION OF ANY OTHER COURT OF APPEALS

Petitioner asserts that "the CAFC's decision stands for the proposition that a party, by failing to object to a *then controlling judicial decision*, waives the application of a subsequent reversal of that decision." Pet. 6 (emphasis added). As discussed above, this assertion fundamentally misstates the effect of *Federal-Mogul II*, which did not reverse or even question the validity of the CIT's decision in *Torrington*. It also fundamentally misstates the "controlling" nature of the *Torrington* decision. *Torrington* was issued by a court at the lowest level of judicial review and thus can hardly be characterized as a "controlling" decision. Moreover, at the time Petitioner failed to make its objection, *Torrington* was only the most recent judicial pronouncement on an issue of law that remained profoundly unsettled. By erroneously characterizing the *Torrington* decision, Petitioner seeks to manufacture an inter-circuit conflict that does not exist. Indeed, as dis-

cussed below, the decision below is consistent with the decisions of other federal courts of appeals in similar circumstances.

In arguing that a conflict exists, Petitioner relies on federal appellate court decisions holding that a party may raise an issue for the first time on appeal where a judicial decision issued after the lower court's decision has changed the law. Pet. 12-13. Those cases hold that a party does not have to object to "settled law," *Phillips v. Cameron Tool Corp.*, 950 F.2d 488, 491 (7th Cir. 1991), or to "then settled principles," *United States v. Scott*, 425 F.2d 55, 57-59 (9th Cir. 1970), in order to rely on the change in the law.[11] The reasoning of those cases is that, where the law is settled, it would be unfair to require a party to make an objection, because that would either require the party to be "clairvoyant" about the subsequent change in the law or require it to "state numerous objections to settled law in hopes that something may change while an appeal is pending." *Phillips v. Cameron Tool Corp.*, 950

[11] Oddly, Petitioner cites one case that is arguably contrary to its own argument that it is unnecessary for a party to timely object in the lower court where a subsequent decision changes *settled* law. *See Hegger v. Green*, 646 F.2d 22 (2d Cir. 1981). *Hegger*, however, is readily distinguishable both from the line of cases relied upon by Petitioner and from this case. *Hegger* was a diversity case decided in accordance with New York law. Following trial in the district court, a decision by the New York Court of Appeals resolved an "unsettled" issue of law on which lower state courts had reached differing conclusions. The Second Circuit's decision to apply the new ruling on appeal, however, appears to have been prompted by federalism concerns and the court's conclusion that the New York state courts would have given effect to the decision under those circumstances. *Id.* at 26-27. *See Robinson v. Shapiro*, 646 F.2d 734, 744 (2d Cir. 1981) (citing *Hegger* as ruling that, in a diversity case involving New York law, that circuit is bound to apply the most recent pronouncements of the New York Court of Appeals). Those concerns do not apply in a case—such as this one—based entirely on federal law. In contrast to *Hegger*, later decisions of the Second Circuit applying federal law rely on the futility of objecting to "entrenched precedent" in deciding that a party did not waive an issue where the decisional law later changed. *See Ingber v. Enzor*, 841 F.2d 450, 454-55 (2d Cir. 1988).

F.2d 488, 491 (7th Cir. 1991). Indeed, as clarified by the D.C. Circuit in a case not cited by Petitioner, the "supervening-decision doctrine" *only* applies "where a supervening decision has changed the law in appellant's favor *and the law was so well-settled at the time of trial that any attempt to challenge it would have appeared pointless.*" *United States v. Washington*, 12 F.3d 1128, 1139 (D.C. Cir. 1994), *cert. denied*, —— U.S. ——, 115 S. Ct. 98 (1994) (emphasis added). "[I]t would be unfair . . . . to expect a defendant to object at trial where existing law appears so clear as to foreclose any possibility of success." *Id. See also United States v. Scarpa*, 913 F.2d 993, 1019 (2d Cir. 1990); *Ingber v. Enzor*, 841 F.2d 450, 454-55 (2d Cir. 1988).

The problem with Petitioner's reliance on cases applying the supervening decision doctrine is that this case presents an entirely different set of circumstances. Most notably, there was no change in the law favorable to Petitioner with respect to the *Torrington* methodology at issue in this case. *Federal-Mogul II* did not overrule *Torrington*, and there has been no subsequent decision of any court contrary to the CIT's decision that the *Torrington* methodology is permissible under the statute. The courts have declined to apply the supervening decision doctrine where the subsequent decision did not significantly clarify or change the law favorably to the appellant. *See Washington*, 12 F.3d at 1139; *United States v. Byers*, 740 F.2d 1104, 1133-34 (D.C. Cir. 1984) (concurring opinion).

In addition, at the time Petitioner failed to timely object to the *Torrington* methodology, there was no "settled" law regarding the permissible methodology for adjusting for foreign direct taxes forgiven on export sales. As discussed above, Commerce's methodology changed repeatedly as the result of a series of CIT and Federal Circuit decisions during 1993-1994. On March 19, 1993, the Federal Circuit in *Zenith II* ruled that Commerce's practice of making both an adjustment to U.S. price and

a "circumstance of sale" deduction to FMV under 19 U.S.C. § 1677b(a)(4)(B) was contrary to the statute. Commerce thereafter adopted the *Federal-Mogul* methodology, which was applied in Commerce's April 28, 1993 final results of the administrative review at issue in this case. On October 7, 1993, however, the CIT rejected the *Federal-Mogul* methodology. *Federal-Mogul Corp. v. United States*, 834 F. Supp. 1391 (Ct. Int'l Trade 1993). That decision, in turn, led Commerce to adopt the *Torrington* methodology, which was approved by the CIT on May 24, 1994. *Torrington Co. v. United States*, 853 F. Supp. 446 (Ct. Int'l Trade 1994). Thus, during the 15 months preceding the CIT's August 10, 1994 oral argument in this case, Commerce used three different methodologies in response to decisions by its reviewing courts.

Significantly, although the CIT at that time had approved the *Torrington* methodology and had rejected the *Federal-Mogul* methodology, neither of those methodologies had yet been reviewed by the Federal Circuit. Contrary to Petitioner's contention that the CIT's ruling in *Torrington* constituted a "controlling judicial decision," Pet. 6, that decision obviously did not bind the Federal Circuit. Indeed, the decision of one CIT judge is not even binding upon another CIT judge. *See Algoma Steel Corp. v. United States*, 865 F.2d 240, 243 (Fed. Cir. 1989). Consequently, Petitioner had no basis for assuming that *Torrington* conclusively settled the issue.

Given the uncertainty and rapid change in the law, it was incumbent upon Petitioner, if it believed that the *Torrington* methodology was not a permissible interpretation of the statute, to preserve that issue by making a timely objection. This was not a case, like those cited by Petitioner, in which there was an unexpected change in accepted judicial interpretations of the law. To the contrary, the law was in a state of flux, and it was predictable that a decision from the Federal Circuit regarding either the *Federal-Mogul* methodology or the

Torrington methodology could change the applicable law once again.

In similar circumstances where the applicable law was unsettled, other courts of appeals have held that a party waived its right to appeal by failing to make an objection at the appropriate time. In *Washington*, the D.C. Circuit ruled that criminal defendants waived their objection to a jury instruction that the same court, in another case decided subsequent to trial, held to be constitutionally deficient. 12 F.3d at 1138-39. The court found that "[a]t the time of trial, the constitutionality of the 'strong belief' jury instruction was not so well-established that any objection would have seemed futile." *Id.* at 1139. The court noted that no court had ever held the instruction to be constitutional and that prior decisions had put the defendants "on notice that a plausible objection to a reasonable doubt instruction" might be successful. *Id.* Similarly, the Second Circuit in *Scarpa*, 913 F.2d at 1019, held that the appellant's failure to object to a jury instruction could not be excused despite a judicial decision issued subsequent to trial that changed the law. The court reasoned that there "was no established circuit authority which would have rendered an objection to the challenged . . . instruction futile, thereby excusing a failure to make such an objection." In *Kattan by Thomas v. District of Columbia*, 995 F.2d 274 (D.C. Cir. 1993), *cert. denied*, —— U.S. ——, 114 S. Ct. 1398 (1994), the D.C. Circuit held that a party waived its right to appeal the district court's award of attorneys fees for legal services provided by one of the plaintiffs acting *pro se* despite the intervening decision of this Court in *Kay v. Ehrler*, 499 U.S. 432 (1991). The court found that the precedent in that circuit on the issue was unsettled and that the defendant could have offered a "legitimate argument" against the fee award even before *Kay v. Ehrler*. *Id.* at 276-77. Given the uncertainty in the law, the defendant had "no reason . . . to assume that this Circuit had conclusively confirmed the availability of a fee award to a *pro se* litigant . . . ." *Id.*

Thus, the decision below is entirely consistent with the decisions of other courts of appeals under similar circumstances. The frequent and recent judicial decisions regarding Commerce's methodology put Petitioner on notice that the law was highly unsettled. Petitioner had no reason to assume that the CIT's *Torrington* decision was conclusive of the issue or that the prevailing law would not change. Under such circumstances, Petitioner was obligated to preserve its objection to the *Torrington* methodology if it intended appealing that issue to the Federal Circuit.

Finally, unlike the cases cited by Petitioner, the issue of Commerce's methodology for accounting for foreign direct taxes forgiven on export sales was actively litigated in this case, so that Petitioner was made aware of the existence of that issue and the need to preserve any objections it had. This was not a case where Petitioner had to be "clairvoyant" in order to raise the issue at the appropriate time. The Ad Hoc Committee's complaint challenged the *Federal-Mogul* methodology used by Commerce in the final results of the administrative review, and briefs filed by all the parties addressed the issue and recognized the necessity for a remand in light of recent court decisions. Thus, Petitioner was fully aware of the importance of the issue and—particularly in light of the nearly four months that elapsed between the Government's request for a remand and oral argument before the CIT—had no excuse for failing to raise its objection. Petitioner had every opportunity to assess the consequences of the *Torrington* methodology and to make the tactical decision whether to acquiesce in Commerce's use of that methodology or to oppose it.

Where the issue sought to be appealed was in dispute in the lower court, other courts of appeals have held that the appellant waived its objection by failing to raise it in a timely manner despite a later change in the law. For example, in *USA Petroleum Co. v. Atlantic Richfield Co.*, 13 F.3d 1276 (9th Cir. 1994), an antitrust case,

the Ninth Circuit held that the appellant waived a theory for recovery despite a later decision of this Court that arguably supported that theory. The court stated:

> The inescapable conclusion . . . is that, although USA recognized below-cost pricing as an independent available theory of predatory pricing under Sherman Act section 1, it made the tactical decision not to rely on that theory but instead chose to advance only its below-market level predation theory. USA thus had a full and fair opportunity to ventilate its views with respect to below-cost pricing; however, USA chose to remove the issue from the case, and thus waived the right to adduce evidence on the matter.

Id. at 1283. "With the issue of the appropriate definition of predatory pricing in dispute, USA was required, should it wish to challenge on appeal ARCO's contention that the section 2 predatory pricing standard applied, to present its contentions concerning the appropriate standard." *Id.* (emphasis added), citing *Singleton v. Wulff.* The Ninth Circuit rejected the appellant's claim that its abandoned theory was revived by the later decision of this Court in *Brook Group v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993). The court acknowledged the principle that a party's failure to raise an issue may be excused by a supervening judicial decision changing the law, but held that principle to be inapplicable where the party "recognized [that the issue] was available but expressly chose not to pursue" it. *Id.* at 1285-86. *See also Kattan,* 995 F.2d at 277 (noting that the defendant had failed to make a timely objection to the requested fee award even though plaintiffs "flagged the issue in a footnote in their application for fees").

Similarly, in this case, Commerce's choice of a methodology for adjusting for foreign direct taxes that are forgiven on export sales was at issue before the CIT, and Petitioner was expressly notified by the Government's brief to the CIT that Commerce would use the *Torrington*

methodology on remand. Thus, Petitioner was aware that it could raise an objection but chose not to do so.

Accordingly, contrary to Petitioner's claim that the decision below is contrary to comparable decisions of other federal appellate courts, there is no such inconsistency. Unlike the cases cited by Petitioner, in this case Petitioner's failure to timely raise an objection cannot be excused because (1) there was no subsequent decision changing the applicable law in a manner favorable to Petitioner; and (2) Petitioner was required to preserve its objection to the *Torrington* methodology because Commerce's methodology for accounting for foreign direct taxes forgiven on export sales was in dispute in this case and the law regarding this issue was not settled, but in flux. In similar circumstances, other federal courts of appeals have held that a party waived its right to appeal. Accordingly, Petitioner has failed to demonstrate any inter-circuit conflict.

CONCLUSION

The Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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January 31, 1997

APPENDIX A

Excerpt From April 18, 1994 Brief Of Defendant, The United States, To The U.S. Court Of International Trade In *Ad Hoc Committee Of AZ-NM-TX-FL Producers Of Gray Portland Cement*, Court No. 93-05-00273

IV. ARGUMENT

A. THE COURT SHOULD REMAND THIS CASE SO THAT COMMERCE MAY APPLY ITS NEW METHODOLOGY FOR MAKING THE VAT ADJUSTMENT.

Subsequent to Commerce's issuance of the final results, this Court in *Federal-Mogul Corp. v. United States,* 834 F. Supp. 1391 (CIT 1993), rejected the way in which Commerce had been interpreting *Zenith* when making the VAT adjustment. Commerce has since adopted the *Federal-Mogul* Court's interpretation of *Zenith* as its practice. *See, e.g., Final Determination of Sales at Less than Fair Value; Certain Stainless Steel Wire Rod from France,* 58 Fed. Reg. 68865, 68866 (Dec. 29, 1993). Accordingly, the Court should remand this case so that Commerce may make the VAT adjustment consistent with its new practice.

APPENDIX B

Excerpt From April 18, 1994 Brief Of Defendant-Intervenor, CEMEX, S.A., To The U.S. Court Of International Trade In *Ad Hoc Committee Of AX-NM-TX-FL Producers Of Gray Portland Cement*, Court No. 93-05-00273

III. THE COURT SHOULD REMAND THIS DETERMINATION TO THE DOC WITH INSTRUCTIONS TO MAKE ADJUSTMENTS FOR THE VALUE ADDED TAX IN ACCORDANCE WITH RECENT JUDICIAL DECISIONS

In the final determination at issue in this litigation, the DOC stated that

> [W]e have changed our practice and will no longer calculate a hypothetical tax on the U.S. product, but will, for the time being, add to the U.S. price the absolute amount of tax on the comparison merchandise sold in the country of exportation. By adding the amount of home market tax to U.S. price, absolute dumping margins are not inflated or deflated by differences between taxes included in FMV and those added to U.S. price.

58 Fed. Reg. at 25,809. Ad Hoc Committee disputes this approach.

Since this statement was published, this Court has issued a number of opinions clearly invalidating the DOC's approach. In *Federal-Mogul Corp. v. United States,* 17 CIT —. Slip Op. 93-221 (November 30, 1993), this Court specifically held that the DOC is required to determine where in the stream of commerce the foreign country applies its value-added tax in the home market, apply the same rate *to the U.S. price* calculated at the same point in the chain of commerce, and add this amount to U.S. price. The methodology employed by the DOC in this case clearly runs counter to that mandated by *Federal-Mogul.* Moreover, the *Federal*

Mogul court also explicitly rejected the DOC's contention that its own approach was supported by language in *Zenith Electronics Corp. v. United States*, 988 F.2d 1573 (Fed. Cir. 1993).

Given that this Court has very clearly rejected the methodology for adjusting U.S. price for forgiven taxes in the home market applied by the DOC in the proceeding at issue here, the determination should be remanded to the agency to recalculate U.S. price in accordance with the dictates of *Federal-Mogul* and *Zenith*.

APPENDIX C

Excerpt From October 19, 1994 Submission By CEMEX, S.A. To The U.S. Commerce Department

III. Upon Remand, The DOC Should Apply Its New Methodology To Adjust U.S. Price and FMV To Take Into Account Indirect Taxes Not Collected Due To Exportation Of The Subject Merchandise

In the final results, the DOC did not calculate a hypothetical tax on U.S. sales but added to U.S. price the absolute amount of tax on the comparison merchandise sold in the home market. 58 Fed. Reg. at 25,809 (1993). The methodology the DOC applied in the final results was subsequently overturned in *Federal-Mogul Corp. v. United States,* 17 CIT —, 834 F.Supp. 1391, 1396 (1994). The Court therefore instructed the DOC to "apply its new VAT methodology as approved in *Torrington Co. v. United States,* 18 CIT —, 853 F. Supp. 446, 448-49 (1994)." The DOC should therefore apply its new methodology in accordance with the Court's instructions.

APPENDIX D

Excerpt from October 23, 1995 Brief Of Appellant, CEMEX, S.A., To The Court Of Appeals For The Federal Circuit In *Ad Hoc Committee Of AZ-NM-TX-FL Producers Of Gray Portland Cement*, Appeal No. 95-1485

C. The VAT Methodology Applied By The DOC In The Remand Results and Affirmed By The CIT Was Contrary To Law And Should Be Reversed

. . .

Although *Federal Mogul II* implies that alternative VAT methodologies may also be found lawful, in this case where the Federal Mogul VAT methodology was applied in the contested final results, the DOC may not at this time request that the alternative VAT methodology used in the invalid remand replace the VAT methodology specifically approved by this Court.

APPENDIX E

RELEVANT STATUTORY PROVISIONS

19 U.S.C. § 1677a (1988)

§ 1677a. United States price

(a) United States price

For purposes of this subtitle, the term "United States price" means the purchase price, or the exporter's sales price, of the merchandise, whichever is appropriate.

(b) Purchase price

For purposes of this section, the term "purchase price" means the price at which merchandise is purchased, or agreed to be purchased, prior to the date of importation, from a reseller or the manufacturer or producer of the merchandise for exportation to the United States. Appropriate adjustments for costs and expenses under subsection (d) of this section shall be made if they are not reflected in the price paid by the person by whom, or for whose account, the merchandise is imported.

(c) Exporter's sales price

For purposes of this section, the term "exporter's sales price" means the price at which merchandise is sold or agreed to be sold in the United States, before or after the time of importation, by or for the account of the exporter, as adjusted under subsections (d) and (e) of this section.

(d) Adjustments to purchase price and exporter's sales price

The purchase price and the exporter's sales price shall be adjusted by being—

(1) increased by—

(A) when not included in such price, the cost of all containers and coverings and all

other costs, charges, and expenses incident to placing the merchandise in condition, packed ready for shipment to the United States;

(B) the amount of any import duties imposed by the country of exportation which have been rebated, or which have not been collected, by reason of the exportation of the merchandise to the United States;

(C) the amount of any taxes imposed in the country of exportation directly upon the exported merchandise or components thereof, which have been rebated, or which have not been collected, by reason of the exportation of the merchandise to the United States, but only to the extent that such taxes are added to or included in the price of such or similar merchandise when sold in the country of exportation; and

(D) the amount of any countervailing duty imposed on the merchandise under part I of this subtitle or section 1303 of this title to offset an export subsidy, and

(2) reduced by—

(A) except as provided in paragraph (1)(D), the amount, if any, included in such price, attributable to any additional costs, charges, and expenses, and United States import duties, incident to bringing the merchandise from the place of shipment in the country of exportation to the place of delivery in the United States; and

(B) the amount, if included in such price, of any export tax, duty, or other charge imposed by the country of exportation on the exportation of the merchandise to the United States other than an export tax, duty, or other charge described in section 1677(6)(C) of this title.

(e) Additional adjustments to exporter's sales price

For purposes of this section, the exporter's sales price shall also be adjusted by being reduced by the amount, if any, of—

(1) commissions for selling in the United States the particular merchandise under consideration,

(2) expenses generally incurred by or for the account of the exporter in the United States in selling identical or substantially identical merchandise, and

(3) any increased value, including additional material and labor, resulting from a process of manufacture or assembly performed on the imported merchandise after the importation of the merchandise and before its sale to a person who is not the exporter of the merchandise.

19 U.S.C. § 1677b (1988)

§ 1677b. Foreign market value

(a) Determination; fictitious market; sales agencies

For purposes of this subtitle—

(1) In general

The foreign market value of imported merchandise shall be the price, at the time such merchandise is first sold within the United States by the person for whom (or for whose account) the merchandise is imported to any other person who is not described in subsection (e)(3) of this section with respect to such person—

(a) at which such or similar merchandise is sold or, in the absence of sales, offered for sale in the principal markets of the country from which exported, in the usual commercial quanti-

ties and in the ordinary course of trade for home consumption, or

(B) if not so sold or offered for sale for home consumption, or if the administering authority determines that the quantity sold for home consumption is so small in relation to the quantity sold for exportation to countries other than the United States as to form an inadequate basis for comparison, then the price at which so sold or offered for sale for exportation to countries other than the United States,

increased by, when not included in such price, the cost of all containers and coverings and all other costs, charges, and expenses incident to placing the merchandise in condition packed ready for shipment to the United States, except that in the case of merchandise purchased or agreed to be purchased by the person by whom or for whose account the merchandise is imported, prior to the time of importation, the foreign market value shall be ascertained as of the date of such purchase or agreement to purchase. In the ascertainment of foreign market value for the purposes of this subtitle no pretended sale or offer for sale, and no sale or offer for sale intended to establish a fictitious market, shall be taken into account.

(2) Use of constructed value

If the administering authority determines that the foreign market value of imported merchandise cannot be determined under paragraph (1)(A), then, notwithstanding paragraph (1)(B), the foreign market value of the merchandise may be the constructed value of that merchandise, as determined under subsection (e) of this section.

(3) Indirect sales and offers for sale

If such or similar merchandise is sold or, in the absence of sales, offered for sale through a sales

agency or other organization related to the seller in any of the respects described in section 1677(13) of this title, the prices at which such or similar merchandise is sold or, in the absence of sales, offered for sale by such sales agency or other organization may be used in determining the foreign market value.

(4) Other adjustments

In determining foreign market value, if it is established to the satisfaction of the administering authority that the amount of any difference between the United States price and the foreign market value (or that the fact that the United States price is the same as the foreign market value) is wholly or partly due to—

(A) the fact that the commercial quantities, in which such or similar merchandise is sold or, in the absence of sales, offered for sale, for exportation to, or in the principal markets of, the United States, as appropriate, in the ordinary course of trade, are less or are greater than the commercial quantities in which such or similar merchandise is sold or, in the absence of sales, offered for sale, in the principal markets of the country of exportation in the ordinary course of trade for home consumption (or, if not so sold for home consumption, then for exportation to countries other than the United States);

(B) other differences in circumstances of sale; or

(C) the fact that merchandise described in paragraph (B) or (C) of section 1677(16) of this title is used in determining foreign market value,

then due allowance shall be made therefor.

(5) Fictitious markets

The occurrence of different movements in the prices at which different forms of any merchandise subject to an antidumping duty order issued under this subtitle are sold (or, in the absence of sales, offered for sale) after the issuance of such order in the principal markets of the foreign country from which the merchandise is exported may be considered by the administering authority as evidence of the establishment of a fictitious market for the merchandise if the movement in such prices appears to reduce the amount by which the foreign market value of the merchandise exceeds the United States price of the merchandise.

(b) Sales at less than cost of production

Whenever the administering authority has reasonable grounds to believe or suspect that sales in the home market of the country of exportation, or, as appropriate, to countries other than the United States, have been made at prices which represent less than the cost of producing the merchandise in question, it shall determine whether, in fact, such sales were made at less than the cost of producing the merchandise. If the administering authority determines that sales made at less than cost of production—

(1) have been made over an extended period of time and in substantial quantities, and

(2) are not at prices which permit recovery of all costs within a reasonable period of time in the normal course of trade.

such sales shall be disregarded in the determination of foreign market value. Whenever sales are disregarded by virtue of having been made at less than the cost of production and the remaining sales, made at not less than cost of production, are determined to be inadequate as a

basis for the determination of foreign market value under subsection (a) of this section, the administering authority shall employ the constructed value of the merchandise to determine its foreign market value.

(c) Nonmarket economy countries

(1) In general

If—

(A) the merchandise under investigation is exported from a nonmarket economy country, and

(B) the administering authority finds that available information does not permit the foreign market value of the merchandise to be determined under subsection (a) of this section.

the administering authority shall determine the foreign market value of the merchandise on the basis of the value of the factors of production utilized in producing the merchandise and to which shall be added an amount for general expenses and profit plus the cost of containers, coverings, and other expenses, as required by subsection (e) of this section. Except as provided in paragraph (2), the valuation of the factors of production shall be based on the best available information regarding the values of such factors in a market economy country or countries considered to be appropriate by the administering authority.

(2) Exception

If the administering authority finds that the available information is inadequate for purposes of determining the foreign market value of merchandise under paragraph (1), the administering authority shall determine the foreign market value on the basis of the price at which merchandise that is—

(A) comparable to the merchandise under investigation, and

(B) produced in one or more market economy countries that are at a level of economic development comparable to that of the nonmarket economy country,

is sold in other countries, including the United States.

(3) Factors of production

For purposes of paragraph (1), the factors of production utilized in producing merchandise include, but are not limited to—

(A) hours of labor required,

(B) quantities of raw materials employed,

(C) amounts of energy and other utilities consumed, and

(D) representative capital cost, including depreciation.

(4) Valuation of factors of production

The administering authority, in valuing factors of production under paragraph (1), shall utilize, to the extent possible, the prices or costs of factors of production in one or more market economy countries that are—

(A) at a level of economic development comparable to that of the nonmarket economy country, and

(B) significant producers of comparable merchandise.

(d) Special rule for certain multinational corporations

Whenever, in the course of an investigation under this subtitle, the administering authority determines that—

(1) merchandise exported to the United States is being produced in facilities which are owned or controlled, directly or indirectly, by a person, firm or corporation which also owns or controls, directly or indirectly, other facilities for the production of such or similar merchandise which are located in another country or countries;

(2) the sales of such or similar merchandise by the company concerned in the home market of the exporting country are nonexistent or inadequate as a basis for comparison with the sales of the merchandise to the United States; and

(3) the foreign market value of such or similar merchandise produced in one or more of the facilities outside the country of exportation is higher than the foreign market value of such or similar merchandise produced in the facilities located in the country of exportation,

it shall determine the foreign market value of such merchandise by reference to the foreign market value at which such or similar merchandise is sold in substantial quantities by one or more facilities outside the country of exportation. The administering authority, in making any determination under this paragraph, shall make adjustments for the difference between the costs of production (including taxes, labor, materials, and overhead) of such or similar merchandise produced in facilities outside the country of exportation and costs of production of such or similar merchandise produced in the facilities in the country of exportation, if such differences are demonstrated to its satisfaction. For the purposes of this subsection, in determining foreign market value of such

or similar merchandise produced in a country outside of the country of exportation, the administering authority shall determine its price at the time of exportation from the country of exportation and shall make any adjustments required by subsection (a) of this section for the cost of all containers and coverings and all other costs, charges, and expenses incident to placing the merchandise in condition packed ready for shipment to the United States by reference to such costs in the country of exportation.

(e) Constructed value

(1) Determination

For the purposes of this subtitle, the constructed value of imported merchandise shall be the sum of—

(A) the cost of materials (exclusive of any internal tax applicable in the country of exportation directly to such materials or their disposition, but remitted or refunded upon the exportation of the article in the production of which such materials are used) and of fabrication or other processing of any kind employed in producing such or similar merchandise, at a time preceding the date of exportation of the merchandise under consideration which would ordinarily permit the production of that particular merchandise in the ordinary course of business;

(B) an amount for general expenses and profit equal to that usually reflected in sales of merchandise of the same general class or kind as the merchandise under consideration which are made by producers in the country of exportation, in the usual commercial quantities and in the ordinary course of trade, except that—

(i) the amount for general expenses shall not be less than 10 percent of the cost as defined in subparagraph (A), and

(ii) the amount for profit shall not be less than 8 percent of the sum of such general expenses and cost; and

(C) the cost of all containers and coverings of whatever nature, and all other expenses incidental to placing the merchandise under consideration in condition, packed ready for shipment to the United States.

(2) Transactions disregarded; best evidence

For the purposes of this subsection, a transaction directly or indirectly between persons specified in any one of the subparagraphs in paragraph (4) of this subsection may be disregarded if, in the case of any element of value required to be considered, the amount representing that element does not fairly reflect the amount usually reflected in sales in the market under consideration of merchandise under consideration. If a transaction is disregarded under the preceding sentence and there are no other transactions available for consideration, then the determination of the amount required to be considered shall be based on the best evidence available as to what the amount would have been if the transaction had occurred between persons not specified in any one of the subparagraphs in paragraph (4) of this section.

(3) Special rule

If, regarding any transaction between persons specified in any one of the subparagraphs of paragraph (4) involving the production by one of such persons of a major input to the merchandise under consideration, the administering authority has reasonable grounds to believe or suspect that an amount represented as the value of such input is less than the costs of production of such input, then the administering authority may determine the value of the major input on the best evidence available regarding

such costs of production, if such costs are greater than the amount that would be determined for such input under paragraph (2).

(4) Related parties

The persons referred to in paragraphs (2) and (3) of this subsection are:

(A) Members of a family, including brothers and sisters (whether by the whole or half blood), spouse, ancestors, and lineal descendants.

(B) Any officer or director of an organization and such organization.

(C) Partners.

(D) Employer and employee.

(E) Any person directly or indirectly owning, controlling, or holding with power to vote, 5 percent or more of the outstanding voting stock or shares of any organization and such organization.

(F) Two or more persons directly or indirectly controlling, controlled by, or under common control with, any person.

(f) Exportation from an intermediate country

If—

(1) a reseller purchases the merchandise from the manufacturer or producer of the merchandise,

(2) the manufacturer or producer of the merchandise does not know (at the time of the sale to such reseller) the country to which such reseller intends to export the merchandise,

(3) the merchandise is exported by, or on behalf of, such reseller to a country other than the United States,

(4) the merchandise enters the commerce of such country but is not substantially transformed in such country, and

(5) the merchandise is subsequently exported to the United States,

such country shall be treated, for purposes of this section, as the country from which the merchandise was exported.

28 U.S.C. § 1254 (1993)

§ 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

28 U.S.C. 1295(a)(5) (1993)

§ 1295. Jurisdiction of the United States Court of Appeals for the Federal Circuit

(a) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction—

. . .

(5) of an appeal from a final decision of the United States Court of International Trade;

. . .

APPENDIX F

Uruguay Round Agreements Act, Pub. L. 103-465, § 224 (1994)

SEC. 224. NORMAL VALUE.

Section 773 (19 U.S.C. 1677b) is amended to read as follows:

"SEC. 773. NORMAL VALUE.

"(a) DETERMINATION.—In determining under this title whether subject merchandise is being, or is likely to be, sold at less than fair value, a fair comparison shall be made between the export price or constructed export price and normal value. In order to achieve a fair comparison with the export price or constructed export price, normal value shall be determined as follows:

. . .

"(6) ADJUSTMENTS.—The price described in paragraph (1)(B) shall be—

"(A) increased by the cost of all containers and coverings and all other costs, charges, and expenses incident to placing the subject merchandise in condition packed ready for shipment to the United States;

"(B) reduced by—

"(i) when included in the price described in paragraph (1)(B), the cost of all containers and coverings and all other costs, charges, and expenses incident to placing the foreign like product in condition packed ready for shipment to the place of delivery to the purchaser,

"(ii) the amount, if any, included in the price described in paragraph (1)(B), attributable to any additional costs, charges,

and expenses incident to bringing the foreign like product from the original place of shipment to the place of delivery to the purchaser, and

"(iii) the amount of any taxes imposed directly upon the foreign like product or components thereof which have been rebated, or which have not been collected, on the subject merchandise, but only to the extent that such taxes are added to or included in the price of the foreign like product, and

"(C) increased or decreased by the amount of any difference (or lack thereof) between the export price or constructed export price and the price described in paragraph (1)(B) (other than a difference for which allowance is otherwise provided under this section) that is established to the satisfaction of the administering authority to be wholly or partly due to—

"(i) the fact that the quantities in which the subject merchandise is sold or agreed to be sold to the United States are greater than or less than the quantities in which the foreign like product is sold, agreed to be sold, or offered for sale,

"(ii) the fact that merchandise described in subparagraph (B) or (C) of section 771(16) is used in determining normal value, or

"(iii) other differences in the circumstances of sale."